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No. _____

IN THE

Supreme Court of the United States

October Term, 1983

ABATTI FARMS, INC. AND ABATTI PRODUCE, INC.,
Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD AND
UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

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QUESTION PRESENTED

A California non-judicial administrative agency has ordered petitioners to pay potentially millions of dollars to workers represented by the United Farm Workers Union. California has foreclosed petitioners' right to *any* judicial determination of the legality of that order. California nevertheless mandates that the unreviewed order be enforced by its courts. Accordingly, petitioners present the following question:

Does the due process clause of the Fourteenth Amendment prohibit a state from taking away the right to have a court determine the legality of an administrative order that will deprive a party of substantial property?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

Abatti Farms, Inc., a California corporation

Abatti Produce, Inc., a California corporation

The Agricultural Labor Relations Board

United Farm Workers of America, AFL-CIO

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OPINIONS BELOW

The opinions of Administrative Law Officer David Nevins and of the Agricultural Labor Relations Board are reported at 7 ALRB No. 36 (October 28, 1981) and reproduced as Appendix A.

Neither the California Court of Appeal nor the California Supreme Court granted review or wrote an opinion. Their orders denying the petitions for writ of review and for hearing are reproduced in Appendices C and E, respectively.

JURISDICTION

The judgment of the California Supreme Court denying the petition for hearing from the Court of Appeal, Fourth Appellate District, was entered on May 4, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution provides:

Fourteenth Amendment.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

The California Constitution provides:

Art. III § 3.5.

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations

* * *

Art. VI § 11.

The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.

The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right.

* * *

Art. VI § 14.

Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

* * *

The California Agricultural Labor Relations Act provides:

Labor Code § 1148.

The Board shall follow applicable precedents of the National Labor Relations Act, as amended.

Labor Code § 1160.8.

Any person aggrieved by the final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the court of appeal having jurisdiction over the county wherein the unfair labor practice in question was alleged to have been engaged in, or wherein such

person resides or transacts business, by filing in such court a written petition requesting that the order of the board be modified or set aside. Such petition shall be filed with the court within 30 days from the date of the issuance of the board's order. Upon the filing of such petition, the court shall cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board within 10 days after the clerk's notice unless such time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the board. The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

An order directing an election shall not be stayed pending review, but such order may be reviewed as provided in Section 1158.

If the time for review of the board order has lapsed, and the person has not voluntarily complied with the board's order, the board may apply to the superior court in any county in which the unfair labor practice occurred or wherein such person resides or transacts business for enforcement of its order. If after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person refuses to comply with the order, the court shall enforce such order by writ of injunction or other proper process. The court shall not review the merits of the order.

* * *

STATEMENT OF THE CASE

Petitioners Abatti Farms, Inc. and Abatti Produce, Inc. ("Abatti") are California corporations growing, harvesting and marketing agricultural produce in California's Imperial Valley. On November 18, 1977, the California Agricultural Labor Relations Board ("ALRB") certified the United Farm Workers of America, AFL-CIO ("UFW") as the collective bargaining representative of Abatti's agricultural employees. The UFW and Abatti later signed a collective bargaining agreement.

Dissatisfaction with the UFW soon surfaced among Abatti workers. In November 1978, two Abatti employees — Toribio Cruz and Manuel Castellanos — circulated petitions for a decertification election. The ALRB held an election on December 27, 1978, and Abatti workers voted to decertify the UFW. After losing the election, the UFW filed with the ALRB election objections and unfair labor practice charges against Abatti.

After hearing, an ALRB-appointed administrative law officer set aside the decertification election, finding that Abatti had assisted Cruz and Castellanos in their decertification efforts. With minor modifications, the ALRB adopted the officer's decision on October 28, 1981.

The ALRB ordered Abatti to "make-whole" the UFW-represented employees by paying approximately one thousand workers the difference between their actual wages and benefits and the significantly more costly wages and benefits in selected UFW contracts with other farmers. The award is retroactive to January 1979, and mounts until Abatti signs a new collective bargaining agreement with the UFW or bargains in good faith to an ALRB-approved impasse. The ALRB proposes to fix, in a separate proceeding, the amount Abatti must pay under the "make-whole" remedy; that amount may be millions of dollars.

Abatti timely sought review in the California Court of Appeal. Abatti challenged the fairness of the ALRB proceedings and the legality of the ALRB findings and order.[1] Without stating any grounds, the Court of Appeal summarily refused to review the ALRB order.[2]

Abatti timely filed a petition for hearing in the California Supreme Court. That petition set forth Abatti's objections to the ALRB decision and to the summary denial of review by the Court of Appeal. Abatti argued that judicial determination by the Court of Appeal of the legality and fairness of the ALRB proceeding was constitutionally compelled, and that the refusal by that court even to consider Abatti's claims was a denial of federal due process.[3] By postcard dated May 4, 1983, the

[1] Abatti's brief in the Court of Appeal is Appendix B. The ALRB's order was—in Abatti's view—manifestly unlawful under California law. The order was the product of agency bias and willful disregard of its statutory mandate. *See* Appendix B; see also Lieberman, *NLRA Precedent in ALRB Decisions: Legislative Intent or Administrative Fiat?* (Cal. State Univ. 1982). The remedy—"make whole"—was wholly unwarranted under the facts of the case and California Supreme Court precedent. Appendix B, pp. 29-33. These state law issues are not before the Court; California's refusal to provide any judicial forum in which they may be determined *is*.

[2] Appendix C.

[3] Appendix D, pp. 40-49. The denial of due process under the Fourteenth Amendment thus arose only upon the Court of Appeal's refusal to review the ALRB order. Abatti raised the federal issue at its first available opportunity, by petition for hearing to the California Supreme Court. The California Supreme Court's postcard denial of Abatti's petition does not discuss the federal constitutional issue Abatti raised there. That does not preclude this Court's resolving the issue, however. *Street* v. *New York*, 384 U.S. 576, 581-584 (1968); *Chambers* v. *Mississippi*, 410 U.S. 284, 290, n. 3 (1973). The petition to the California Supreme Court shows the constitutional issue was squarely presented. When the record shows by clear implication that the federal question was adequately presented, this Court has jurisdiction to examine the claim. *Webb* v. *Webb*, 452 U.S.493, 496-497 (1981); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655 (1897).

California Supreme Court also summarily denied Abatti's petition with no determination on the merits.[4]

REASONS FOR GRANTING THE WRIT

Whatever else due process may mean, it surely requires that a person whose property is to be taken by court order is entitled at some point to have some court tell him the taking is legal. Under the California procedure for enforcement of ALRB orders, the *only* court with jurisdiction to determine the validity of the ALRB order is the Court of Appeal. Under California law, as enacted, the Court of Appeal is required to make this determination before the order may be enforced.

The California Supreme Court recently eliminated the mandate that Courts of Appeal determine the legality of ALRB orders; such courts now have discretion to decide whether or not they will review ALRB orders on the merits.

Like 80% of those seeking Court of Appeal review since the elimination of mandatory review, Abatti received no review on the merits. As the matter now stands, the Superior Court is required to enforce the ALRB's order, but it has no jurisdiction to determine its legality. Abatti faces deprivation of substantial property, by court process, without any court ever determining the taking is legal.

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[4] Appendix E.

Abatti then instituted a federal civil action, *Abatti Farms, Inc.* v. *Agric. Lab. Rel. Bd.*, Civil Action No. 83-1111-E, United States District Court for the Southern District of California, seeking to enjoin the ALRB from initiating proceedings in the Superior Court to enforce its order until some court reviews it on the merits and adjudges it to be valid. The district court refused to issue a temporary restraining order, declining to interfere with state proceedings. *See* 28 U.S.C. § 2283 (the "Anti-Injunction Act").

Following the district court's decision, the ALRB began an action in California Superior Court to enforce its order. The Superior Court is prohibited from reviewing the merits of the ALRB's order. Cal. Lab. Code § 1160.8.

Whether a state may grant judicial enforcement to confiscatory orders of a non-judicial adminstrative agency, and yet deny aggrieved parties any right to have the enforcing court or, indeed, any court, anywhere, determine that the order is valid is an issue never before expressly decided by this Court. It demands resolution to avoid manifest injustice and to ensure vitality of the rule of law.

I. CALIFORNIA HAS TAKEN AWAY ABATTI'S RIGHT TO HAVE A COURT DETERMINE THE LEGALITY AND FAIRNESS OF THE ALRB ACTION.

The California legislature enacted the Agricultural Labor Relations Act ("ALRA") in 1975 and modeled it after the National Labor Relations Act ("NLRA").[5] The statutes are for the most part identical. *Perry Farms, Inc.* v. *Agricultural Lab. Rel. Bd.*, 86 Cal.App.3d 448, 462, 150 Cal.Rptr. 495, 503 (1978). The ALRB is mandated to follow applicable NLRB precedent. Cal. Lab. Code § 1148 (West Supp. 1983). Substantive NLRB precedent — including precedent requiring judicial review on the merits before enforcement — was specifically incorporated as the body of law governing ALRB adjudications. *Nishiwaka Farms, Inc.* v. *Mahony*, 66 Cal.App.3d 781, 787, 136 Cal.Rptr. 233, 236 (1977). Neither agency has power to enforce its own orders. Both depend on courts and court process to achieve enforcement.

The judicial review provisions of the ALRA (Cal. Lab. Code § 1160.8 (West Supp. 1983)) and the NLRA (29 U.S.C. §§ 160(e) & (f) (1976)) both provide for review by petition to an appellate court. Both confer jurisdiction on that court by identical language:

> Upon the filing of such petition . . . the court shall have jurisdiction to grant the board such temporary relief or restraining order as it deems just and proper and in like manner to make and enter a decree

[5] Cal. Lab. Code § 1141, *et. seq.* (West Supp. 1983) and 29 U.S.C. § 141, *et seq.* (1976), respectively.

> enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board. Cal. Lab. Code § 1160.8 (West Supp. 1983) and 29 US.C. §§ 160(e) & 160(f) (1976).

Both provide for the same standard of appellate review by identical language:

> The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. Cal. Lab. Code § 1160.8 (West Supp. 1983) and 29 U.S.C. § 160(f) (1976).

For 47 years federal courts have consistently read this language to create "an independent statutory proceeding initiated in the Court of Appeals" (*Kovach* v. NLRB, 229 F.2d 138, 141 (7th Cir. 1956)), in which the court is required to hear and consider objections from the aggrieved party (*Ford Motor Co.* v. *Labor Board*, 305 U.S. 364, 370 (1939)) and decline enforcement of the NLRB order if the court concludes the NLRB acted improperly (*Labor Board* v. *Warren Co.*, 350 U.S. 107, 112 (1955)). The jurisdiction conferred is appellate, not original. Review is not discretionary. Review is on the merits. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *see also*, Fed. Rules of App. Proc. 20.

This Court held the NLRA is constitutional because, *inter alia*, NLRB decisions can be enforced only after found by a court to be legally enforceable:

> The order of the Board is subject to review by the designated court and only when sustained by the court may the order be enforced. Upon that review, all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording ade-

> quate opportunity to secure judicial protection against arbitrary action . . . *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937).

The California counterpart, § 1160.8, also mandates judicial review on the merits. It directs the Court of Appeal to perform a judicial act — to "make and enter a decree enforcing, modifying . . . or setting aside" the ALRB order. Only after such review on the merits may the order be enforced. In enforcement proceedings, the Superior Court may not review the merits, since the legality of the order *presumably* has already been determined by the reviewing court. Thus, the Court of Appeal is the only forum in which the validity of the ALRB order may be determined. Cal. Lab. Code § 1160.8 (West Supp. 1983).

In *Perry Farms*, 86 Cal.App.3d at 465, 150 Cal.Rptr. at 503-504, the Court of Appeal upheld the constitutionality of the ALRA in part because it provided for review identical to the NLRA.

One year later, however, the California Supreme Court, in *Tex-Cal Land Management, Inc.* v. *Agricultural Lab. Rel. Bd.*, 24 Cal.3d 335, 350-351, 156 Cal.Rptr. 1, 9-10, 595 P.2d 579, 587-588 (1979) judicially excised the right to judicial review that the legislature had expressly provided. It held, instead, that ALRB decisions are reviewable only by application for an extraordinary prerogative writ — in the nature of mandamus — which, unlike an appeal, may be summarily denied without adjudication of the merits or statement of reasons.

The court cited no reason of policy or legislative intent in reaching its conclusion. It acknowledged that ALRA § 1160.8's federal counterpart, NLRA §§ 10(e) and (f), specifically provides for review on the merits as a matter of right:

> The absence from the federal scheme of judicial discretion to deny a petition for review without full consideration of the merits suggests the possibility that § 1160.8 review also is a matter of right. 24 Cal.3d at 348-349, 156 Cal.Rptr. at 9.

It acknowledged that Article VI, § 11 of the California Constitution creates appellate jurisdiction as a matter of right "in other causes prescribed by statute"—precisely the kind of appellate right granted in § 1160.8. Nevertheless, the court decided that the review described in § 1160.8 was more in the nature of a petition for extraordinary relief *solely* because § 1160.8 does not call for a "notice of appeal," but provides for a "petition."

Thus, notwithstanding (1) the plain language of § 1160.8, (2) the federal mandate for full review in identical NLRA provisions, (3) the incorporation of this federal mandate into California law (4) *Perry Farms'* reliance on this right to judicial review in upholding the ALRA and, (5) the availability of appellate jurisdiction under Article VI, § 11, the court held that courts of appeal may treat review of ALRB orders as purely discretionary review, available only if the reviewing court elects to engage in a full determination of the cause presented to it.

The regimen created by *Tex-Cal* would pose no particular constitutional vice[6] if courts of appeal still made determinations of the validity and enforceability of ALRB orders, albeit doing so within their mandamus jurisdictions. The problem is they do not. Since *Tex-Cal*, 80% of parties aggrieved by ALRB orders[7]—including Abatti—have had their requests for judicial determination of the legality of ALRB orders answered with only: "The petition for writ of review is denied." Appendix C.

Under California law these summary denials are not judicial determinations on the merits of the claim presented, nor judicial determinations that the ALRB decision and order is valid and enforceable. An appellate court determination on the merits, under California law, requires a written decision with

[6] The due process issue was not raised in *Tex-Cal*, nor brought to this Court—no doubt because the party aggrieved, Tex-Cal, had full judicial determination on the merits, once in the District Court of Appeal and again in the California Supreme Court.

[7] *See* ALRB Cumulative Litigation Results, published by the ALRB, Appendix F.

reasons stated. Cal. Const. art. VI § 14. Abatti has not been told that the ALRB order is valid, or legal, or enforceable. Abatti has not been told that its claim of invalidity lacks merit. Abatti has only been told that its request that the Court of Appeal intervene and determine whether the ALRB order is legal is "denied."

Tex-Cal held that:

> [T]he functions assigned a Court of Appeal by Section 1160.8 are within its original jurisdiction over a proceeding 'For extraordinary relief in the nature of mandamus.' (Art. VI, § 10). 24 Cal. 3d at 350, 156 Cal. Rptr. at 9-10, 595 P.2d at 587-588.

It has long been the law in California that denial of an application for an extraordinary writ without opinion or statement of reasons is not on the merits, and does not constitute a "judicial determination of a cause" within the meaning of Cal. Const. art. VI § 14. *People* v. *Medina*, 6, Cal.3d 484, 490-491, *99* Cal. Rptr. *630, 634, 492* P.2d *686, 689-690 (1972); Funeral Directors Assn.* v. *Board of Funeral Directors*, 22 Cal. 2d 104, 106, *136* P.2d *785, 786* (1943).

Moreover, in its mandamus jurisdiction an appellate court is not being asked to determine whether the order before it is valid and enforceable. It is being asked to perform the extraordinary act of intervention in the affairs of a subordinate body, and typically will not do so unless the issues presented are "novel" or of general importance.[8] Its jurisdiction is akin to the certiorari jurisdiction of this Court.

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[8] *Randone* v. *Appellate Dept.*, 5 Cal.3d 536, 542-543, 96 Cal.Rptr. 709, 719, 489 P.2d 13, 16 (1971); *American Nat'l Liab. Ins. Co.* v. *Superior Court*, 38 Cal.App.3d 579, 589, 113 Cal.Rptr. 561, 569 (1974).

A comparison of NLRB and ALRB operating statistics make clear that California Courts of Appeal are not according aggrieved parties full review on the merits.

Despite its 47 years of experience, NLRB decisions were affirmed in full by the Circuit Courts of Appeals in only 70.9 percent of the 1,458 review or

Footnote continued on next page

The ALRB is at this very moment seeking to enforce its order in Superior Court proceedings, in which that court "shall not review the merits of the order." Cal. Lab. Code § 1160.8. Because *Tex-Cal* takes away Abatti's right to court of appeal determination on the merits, Abatti faces the prospect of a court order of enforcement without any court ever having determined that the ALRB order is legal.

As the ALRB would have it, Abatti will receive judicial consideration on the merits — absent action by this Court — only by willfully disobeying the Superior Court enforcement order, being adjudicated in contempt, and hoping to obtain judicial review by writ of habeas corpus.[9] Due process demands that Abatti not be forced to violate a court order, and

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Footnote continued from previous page

enforcement proceedings conducted in fiscal years 1974-1978. NLRB, *44th Annual Report for the Fiscal Year Ending September 30, 1979*, Table 19A.

Despite its infancy and the many questions of first impression facing it, the ALRB's "success rate" on petitions for review is much higher. *If* summary denials are counted as "affirmances"—because they leave the order intact—the ALRB was "affirmed" by courts of appeal in an astonishing 87 percent of review cases brought since 1975. Where, however, the writ of review was granted and the court conducted a full review and determination of the merits, the ALRB was affirmed in full in only 42 percent of its cases. *See* Appendix F (10 of 24 opinions written).

Petitioners doubt that the explanation for the ALRB's "success" is that it has in its 8 years of experience developed an adjudicatory expertise far superior to its federal brethren. Petitioners submit the answer to these statistical disparities is simply that a *"Tex-Cal"* type review is something less than full review on the merits to determine the legality and enforceability of ALRB orders.

[9] The ALRB offers Abatti a Hobson's choice:

> [I]f Abatti Farms wishes to test the matter out specifically through the state court [enforcement] proceedings, they can refuse to comply with the Superior Court order of enforcement once it's obtained by the Agricultural Labor Relations Board on the grounds that the order is based upon an unconstitutional decision, and they can take the issues specifically and clearly through the California courts and then to the United States Supreme Court if they wish. . . .

Manuel M. Medeiros, Esq. for the general counsel of the ALRB, in *Abatti Farms, Inc.* v. *Agric. Lab. Rel. Bd.*, Civil Action No. 83-1111-E, United States District Court for the Southern District of California, Reporter's Transcript of Proceedings, Thursday, June 16, 1983 at p. 17.

suffer fines or imprisonment,[10] simply to have some court, somewhere, sometime, determine that the order depriving it of property is legal.

II. THE ELIMINATION OF ABATTI'S RIGHT TO HAVE A COURT DETERMINE THE LEGALITY OF THE ALRB'S ORDER VIOLATES DUE PROCESS.

Labor Code § 1160.8, as construed in *Tex-Cal* and applied in this case, denies due process for three reasons:

A. *The ALRA, as Construed, Unconstitutionally Denies Abatti Access to Court.*

A state may not deny access to its judicial process to a litigant seeking to protect a fundamental interest, if resort to the court is the only realistic means of protecting that interest. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), *United States* v. *Kras*, 409 U.S. 434 (1973), and *Ortwein* v. *Schwab*, 410 U.S. 656 (1973). In *Boddie*, this Court analogized litigants who could not become divorced except by access to the courts to defendants "faced with exclusion from the only forum effectively empowered to settle their disputes." 401 U.S. at 376. This is precisely Abatti's plight. Under the ALRA the Court of Appeal is the only forum in which the legality of the ALRB order may be determined. That court's summary refusal to review deprives Abatti of any right to a legal determination of its dispute with the ALRB.

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[10] Contempt, under California law, is not appealable and can be reviewed *solely* by habeas corpus. *Moffat* v. *Moffat*, 27 Cal.3d 645, 656, 165 Cal.Rptr. 877, 883, 612 P.2d 967, 973 (1980); Cal. Code of Civ. Proc. §§ 1222 and 904.1. This Court has held that a party who disobeys a court order and is adjudicated in contempt will not be relieved of that contempt even if the order was improper or based on unconstitutional grounds. *Walker* v. *City of Birmingham*, 388 U.S. 307, 320 (1967); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293 (1947).

B. *California's Elimination of Abatti's Right to Have Some Court Determine that the ALRB Order is Legal Before It is Judicially Enforced Lacks Any Rational Relationship to a Legitimate State Interest.*

Abatti's right to judicial review on the merits under Labor Code § 1160.8, as enacted, is akin to a cause of action and, as such, is protected by the due process clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *see also, Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, ___ U.S. ___, 51 U.S.L.W. 4636, 4639 (May 31, 1983).

Logan held that state procedural rules which prevent judicial determination on the merits must pass muster under the due process clause. Like the petitioner in *Logan*, Abatti has a property interest in the right to a court determination of the merits of its claim. Like Logan, Abatti was denied a determination on the merits by the imposition of a procedural rule — the *Tex-Cal* elimination of § 1160.8 right to review. As in *Logan*, this procedural rule has prevented a determination of Abatti's claim on its merits.[11]

The vice in *Logan* was that the procedural rule — a 120-day conciliation requirement — deprived Logan of her claim in a "random" manner, presenting an "unjustifiably high risk that meritorious claims will be terminated." 455 U.S. at 434-435. Abatti's deprivation is equally "random," in two respects.

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[11] In *Logan*, the court weighed the state's interest in asserting its procedural rule. In this case, California has no countervailing interest. *Tex-Cal* does not suggest *any* policy reason why ALRB petitioners — unlike every other aggrieved party before California non-judicial agencies, *infra*, — should not be given full judicial review on the merits. On the contrary, *Tex-Cal* truly represents form over substance. The decision turned on the technical niceties between a "Notice of Appeal" and a "Petition for Review" — a distinction which has caused no problem for the federal courts in making minor adjustments to their appeal procedures to accommodate NLRB appeals.

First, *Tex-Cal,* by allowing California courts of appeal to deny, out-of-hand, petitions for review of ALRB decisions, results in good claims as well as bad being randomly rejected without full review and decision.

Second, the ALRB is the *only* California administrative agency that can award damages in an adjudicative proceeding, and get its orders judicially enforced, without *any* judicial determination of the legality of the order. Except for the ALRB, and three California administrative agencies constitutionally empowered to exercise judicial functions,[12] adjudicative decisions of the more than 100 other California administrative agencies are reviewed by writ of mandate or administrative mandamus (Cal. Code of Civ. Proc. § 1085, § 1094.5, respectively) to the Superior Court, where a determination on the merits is guaranteed — either in the Superior Court, or on full appeal, or both. Cal. Code Civ. Proc. § 904.1. There is no valid state purpose for singling out ALRB claimants for exclusion from California's uniform review system.

C. *Due Process Guarantees the Right to Have a Court Determine the Legality of the ALRB's Action in this Case Before its Order May Be Judicially Enforced.*

Where important rights are at stake, due process guarantees judicial review. *Yakus* v. *United States,* 321 U.S. 414 (1944) held that due process demands an "opportunity to be

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[12] The Public Utilities Commission (Cal. Const. art. XII §§ 5 and 6), Workers' Compensation Appeals Board (Cal. Const. art. XIV § 4) and Alcoholic Beverage Control Appeals Board (Cal. Const. art. XX § 22). Judicial review of these agencies is by petition for review subject to summary denial. *Consumers Lobby Against Monopolies* v. *Public Util. Comm'n,* 25 Cal.3d 891, 901, 160 Cal.Rptr. 124, 129, 603 P.2d 41, 46 (1979). Unlike petitioners, litigants before these agencies have had their "day in court" before the judiciary. Abatti recognizes that a state need not provide for judicial review of its constitutional courts. *Griffin* v. *Illinois,* 351 U.S. 12, 18 (1956).

heard and for judicial review which satisfies the demands of due process."[13]

In *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936), Justice Brandeis (concurring) said:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.

St. Joseph held that legislative actions are

> necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. 298 U.S. at 51-52.

This rule of law extends to administrative determinations. *Crowell* v. *Benson*, 285 U.S. 22 (1932).

Whether a state may shield an administrative agency from any judicial review when its action affects pre-existing rights "is at the very least doubtful . . . ." *Ortwein* v. *Schwab*, 410 U.S. 656, 665 (1973) (Marshall, J., dissenting).[14] As a practical

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[13] Professor Jaffe, in his study of judicial review of agency action, articulated the now familiar "presumption of judicial review":

> "[I]n our system of remedies, an individual whose interest is acutely and immediately affected by an administrative agency action has a right to secure at some point a judicial determination of its validity." Jaffe, *Judicial Control of Administrative Action*, 336 (1965).

See, Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967).

[14] Last term in *Northern Pipeline Construction* v. *Marathon Pipeline Co.*, ___ U.S. ___, 102 S.Ct. 2858 (1982) the Court concluded that only an Article III court can adjudicate private rights. Citing *Atlas Roofing Co. Inc.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), the Court suggested that the Constitution prohibits insulating administrative adjudications from judicial review. ___ U.S. at ___, 102 S.Ct. at 2870-71, n. 23.

matter, access to the judiciary to scrutinize reviewable agency action is universally available on the federal level[15] and almost always provided by the states.[16]

The availability of judicial review has been an essential element in agency adjudication schemes that have passed constitutional muster before this Court. Further, this Court has emphasized the salutary role of judicial review in protecting against a variety of evils.[17] Whether the right to judicial review is a right of constitutional dimension, or simply a very important and almost universally available right, it has become such an essential part of fair administrative adjudicating schemes

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[15] *See* 4 K. Davis, Administrative Law Treatise § 28 (1958) and Supp. (1982) ch. 28. Professor Davis attributes this availability to the existence of District Court federal question jurisdiction (28 U.S.C. § 1331), providing access to court in all federal agency cases where some other method of challenge to agency action is not statutorily mandated. Davis states: "*Reviewable administrative action may always be reviewed under 1331 unless a specific statute provides some other remedy.*" 4 K. Davis, *Administrative Law Treatise*, § 23.7, at 155 (2d Ed. 1983). (Emphasis in original.)

[16] Jaffe, *The Right to Judicial Review II*, 71 Harv. L.Rev. 769, 795 (1958). Jaffe observes that because judicial review is usually available, the question of its constitutional dimensions is "seldom directly presented." (*Id.*) At least six states, including California, have considered whether due process requires a right to judicial review of agency action. Each has, either expressly or by implication, answered affirmatively. *See Idaho Mut. Benefit Ass'n, Inc.* v. *Robison*, 65 Ida. 793, 804, 154 P. 2d 156, 161 (1944); *Fire Dept. of City* v. *City of Fort Worth*, 147 Tex. 505, 509, 217 S.W. 2d 664, 666 (1949); *Dation* v. *Ford Motor Co.*, 313 Mich. 152, 22 N.W. 2d 252 (1956); *Hunter* v. *Zenith Dredge Co.*, 220 Minn. 318, 19 N.W. 2d 795 (1945); *County of Madera* v. *Carleson*, 32 Cal.App.3d 764, 772, 103 Cal.Rptr. 515, 521 (1973), *overruled on other grds*, 31 Cal.3d. 166, 180 (1982); and *Broadriver, Inc.* v. *The City of Stamford*, 158 Conn. 522, 527, 265 A.2d 75, 78 (1970). *See also*, Jaffe, *The Right to Judicial Reveiew I*, 71 Harv. L.Rev. 401 (1958); 4 K. Davis, *Administrative Law Treatise*, § 28.28 (1958); Jaffe, *Judicial Control of Administrative Action* (1965).

[17] See, e.g., *Goldberg* v. *Kelly*, 397 U.S. at 266-267 [to "guide future decisions"]; *Mathews* v. *Eldridge*, 424 U.S., 319, 349 [to assure "fair consideration of" claims]; *NLRB* v. *Jones Laughlin Steel Corp.*, 301 U.S. at 47 [to protect "against arbitrary action"]; and *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. at 51-52 [to assure the supremacy of the rule of law].

that to eliminate it out-of-hand, as California has, for no good reason, is constitutionally impermissible when applied to a private right litigant like Abatti.

When the importance of the right to judicial review—to litigants generally and Abatti in particular — is balanced against whatever interest California may have in the technical niceties of the label on the document required to initiate proceedings before its appellate courts, the balance must be struck in favor of Abatti under the due process clause. *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976).[18]

III. THE ALRA, AS CONSTRUED AND APPLIED, IS UNCONSTITUTIONAL UNDER *MARBURY* v. *MADISON* AND THE FIRST AMENDMENT.

Stripped to its essentials, the constitutional vice of the ALRA scheme, as applied to Abatti, is that it *requires* the Superior Court to enforce an unadjudicated executive branch order, but *prohibits* it from determining the lawfulness of the order before enforcing it. It mandates that the judiciary place its imprimatur on executive deprivation regardless of whether the executive acted lawfully. It destroys the fundamental constitutional function of the judiciary—to determine the lawfulness of executive action depriving citizens of property (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) *137* (1803)), and renders meaningless Abatti's First Amendment right to judicial determination of its claim. *See Bill Johnson's Restaurants, Inc.*, 51 U.S.L.W. at 4639. Abatti asks only that some court, somewhere, *tell* it whether the ALRB order is valid.

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[18] The "pre-deprivation hearing cases" of the 1960's and 1970's further underscored the importance of judicial review as an element of procedural due process. *See, e.g., Snaidach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). As construed by the California Supreme Court, the procedural protections afforded by the ALRA are constitutionally inadequate under the test enunciated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), since the unconstitutional denial of access to the judiciary could be eliminated by requiring that existing appellate procedures be made available to petitioner.

CONCLUSION

Mindful of this Court's teaching in *Johnson v. Robison*, 415 U.S. 361, 366-367 (1974), that a statute should be construed, whenever possible, consistent with constitutional dictates, the deprivation of due process which results from *Tex-Cal* can be repaired by directing that the California Court of Appeal reverse, modify or affirm Abatti's case on the merits, and give Abatti its day in court.

DATED: August 2, 1983

Respectfully submitted,

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CLERK

No. 83-190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ABATTI FARMS, INC. AND ABATTI PRODUCE, INC.
Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD AND
UNITED FARM WORKERS OF AMERICA, AFL-CIO
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of California

PETITIONERS' SUPPLEMENTAL BRIEF

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vs.

AGRICULTURAL LABOR RELATIONS BOARD AND
UNITED FARM WORKERS OF AMERICA, AFL-CIO
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of California

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners wish to inform the Court that on October 18, 1983, after petitioners' last filing (Sup. Ct. Rule 22.6), petitioners received the ALRB's formal backpay specification setting forth the ALRB's computation of the precise amount ABATTI must pay to satisfy the ALRB's order in the case now pending before this Court. That amount is $18,432,960.59, plus interest. Approximately $17.5 million represents the ALRB's assessment for ABATTI's refusal to bargain, which was found to be unlawful largely because ABATTI assisted two of its non-English speaking workers to obtain independent legal counsel to advise them concerning their rights under the California ALRA. Appendix A, at pp. 6-7, 13; Appendix B, at pp. 20-25.

Relevant portions of the ALRB's "Makewhole and Backpay Specification" are set forth in the Appendix to this Supplemental Brief.

DATED: October 21, 1983

Respectfully submitted,

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APPENDIX

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In The Matter of: ABATTI FARMS, INC., and ABATTI PRODUCE, INC., *Respondent/Employer,* and UNITED FARM WORKERS OF AMERICA, AFL-CIO, *Charging Party,* and TORIBIO CRUZ and JOSE DONATE, *Petitioners/Intervenors.*	Case Nos. 78-RD-2-E 78-CE-53-E 78-CE-53-1-E 78-CE-53-2-E 78-CE-55-E 78-CE-56-E 78-CE-58-E 78-CE-60-E 78-CE-60-1-E 78-CE-61-E 79-CE-5-EC 7 ALRB No. 36 MAKEWHOLE AND BACKPAY SPECIFICATION

Pursuant to 8 Cal. Admin. Code Section 20290(a) and 20290 (c), the Regional Director of the El Centro Regional Office, hereby issues the Makewhole and Backpay Specification in the above-referenced case number which was previously noticed for hearing by the Executive Secretary on July 26, 1983.

* * *

2. The Regional Director, taking into consideration the Board's decision in *Adam Dairy* (1978) 4 ALRB No. 24, as well as subsequent Board precedent, finds that the contract negotiated by the UFW specifically at the company known as Sun Harvest, Inc., in effect on September 4, 1979 through July 15, 1983, provides the reasonable measure of the compensation which employees could have been expected to obtain if respondent had met its bargaining obligations during the make-whole period.

3. The Regional Director has determined that the parties have not reached a bona fide impasse or a collective bargaining agreement. In order to effectuate the Board's remedial order, the Regional Director finds that the make-whole period in this case runs from January 2, 1979 through September 30, 1983. The Regional Director's determination to use September 30, 1983 as the cut-off date for make-whole liability in this case does not constitute a determination regarding any violation by respondent of Labor Code Section 1153(e) which may have occurred subsequent to September 30, 1983 nor regarding the remedy for any such violation.

* * *

9. The responsibility of the respondent is to pay its employees the makewhole and backpay amount, as set forth in the attached specifications.

Dated this 14 day of October, 1983, at El Centro, California.

DAVID ARIZMENDI
Regional Director
AGRICULTURAL LABOR RELATIONS BOARD
319 Waterman Avenue
El Centro, California 92243
(619) 353-2130

* * *

LIABILITY TOTALS

MAKEWHOLE AMOUNTS

MELON HARVESTERS	
PIECERATE	4,069,243.28
REYNA	211,804.76
HOURLY	981,909.64
LETTUCE HARVESTERS	
HOURLY	41,605.02
PIECERATE	1,717,312.27
TRACTOR OPERATORS	2,324,212.13
ONION HARVESTERS	1,685,012.13
IRRIGATORS	2,126,751.55
THIN-WEEDERS	511,817.12
RAPINI HARVESTERS	
HOURLY	68,916.40
PIECERATE	2,463,583.09
SHOVELERS	576,300.10
SPRINKLERS	699,206.50
	17,477,673.99

BACKPAY AMOUNTS

Clemente Fernandez	80,348.45
Gregoria Fernandez	80,348.45
Jose Armando Fernandez	80,348.45
Francisco Salas	88,583.94
Maria de la Luz Torres	1,465.90
Maria Valdez	1,015.80
Rosa Briseno	45,916.51
1978 Rapini crew (140 workers)	577,259.20
	955,286.60

MAKEWHOLE	17,477,673.99
BACKPAY	955,286.60
TOTAL	$18,432,960.59

83-190

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No. _____

IN THE

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October Term, 1983

ABATTI FARMS, INC. AND ABATTI PRODUCE, INC.,

Petitioners,

VS.

AGRICULTURAL LABOR RELATIONS BOARD AND UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Respondents.

APPENDICES

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APPENDIX A

El Centro, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

ABATTI FARMS, INC., and ABATTI PRODUCE, INC. *Respondent/Employer,* and UNITED FARM WORKERS OF AMERICA, AFL-CIO, *Charging Party,* and TORIBIO CRUZ and JOSE DONATE, *Petitioners/Intervenors.*	Case Nos.	78-RD-2-E 78-CE-53-E 78-CE-53-1-E 78-CE-53-2-E 78-CE-55-E 78-CE-56-E 78-CE-58-E 78-CE-60-E 78-CE-60-1-E 78-CE-61-E 79-CE-5-EC
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DECISION AND ORDER

On March 23, 1980, Administrative Law Officer (ALO) David Nevins issued the attached Decision in this proceeding. Thereafter, Respondent, Charging Party, Petitioners[1] and the General Counsel each filed exceptions with a supporting brief, and a brief in response to the exceptions of the other parties.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings and conclusions of the ALO, as

[1] This case arose from a decertification election held among Respondent's employees on December 27, 1978. The hearing was a consolidated proceeding involving post-election objections, challenged ballots, and alleged unfair labor practices. The Petitioners named in the caption of this matter filed the decertification petition and became intervenors at the hearing. As we are dismissing the Petition for Decertification in this case, we find it unnecessary to discuss the ALO's recommended resolution of the issues raised by the challenged ballots.

modified herein, and to adopt his recommended Order as modified herein.

Respondent's and Petitioners' Exceptions[2]

Respondent has excepted to the ALO's reliance, in his consideration of the case, on: our Decision in *Abatti Farms, Inc.* (May 9, 1979) 5 ALRB No. 34, enf'd in principal part, *Abatti Farms* v. *ALRB* (1980) 107 Cal.App.3d 317; evidence of Respondent's anti-union statements and conduct, and problems which arose between Respondent and the UFW with respect to the administration of their contract.[3] Respondent's precise exception respecting the ALO's reliance on our prior unfair labor practice Decision is based upon the fact that that Decision was under review at the time Respondent filed its exceptions. As that Decision has, in the main, been upheld by the court of appeal, we take it as clearly established that we can take it into account in our consideration of this case.[4] *Local Lodge No.1424, IAM v. NLRB* (1960) 326 U.S. 411, 416 [45 LRRM 3212] (Board can properly look to earlier events "to shed light on the true character" of events which are the subject of hearing). Nor was it improper for the ALO to utilize evidence of

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[2] Petitioners have joined in Respondent's exceptions as well as lodging some of their own. For the sake of brevity, exceptions filed by one party, even when joined in by the other, will be identified by the title of the party initiating them.

[3] Respondent and Petitioner make one other, generalized exception to what they characterize as an imbalance of credibility resolutions in favor of General Counsel witnesses. In the first place, even if such an imbalance could be said to exist, "'total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.'" *Andrews* v. *Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 796, quoting *Labor Board* v. *Pittsburg S.S. Co.* (1949) 337 U.S. 656, 659 [25 LRRM 2177]. Secondly, the ALO credits much testimony of Respondent's witnesses. Although we accord great deference to the credibility resolutions of the trier of fact, *Adam Dairy dba Rancho Dos Rios* (Apr. 26, 1978) 4 ALRB No. 24, rev. den. by Ct. App., 2d Dist., Div. 3, March 17, 1980, pursuant to our statutory duty we have reviewed the entire record of this case, Labor Code section 1160.3, and find that it generally supports the ALO's credibility resolutions.

[4] Although Respondent's precise exception has been mooted by the court of appeal decision, we point out that it was not error for the ALO to have relied upon our prior Decision even when it was under review. *NLRB* v. *Mueller Brass Co.* (1975) 509 F.2d 704, 709 [88 LRRM 3236].

Respondent's anti-union acts and statements in his consideration of the case, for "motive is a persuasive interpreter of equivocal conduct." *Pennsylvania Greyhound Lines, Inc.* (1937) 1 NLRB 1, 23 [1 LRRM 303], enf'd in part (3d Cir. 1937) 91 F.2d 178, rev'd, (1938) 303 U.S. 261.

> Hostility toward the union was not in itself an unfair labor practice and a presumption that such state of mind once proven was presumed to continue to exist [does] not shift the burden of proving [an] alleged unfair labor practice. . . .
>
> . . . . . .
>
> We think the Board properly took judicial notice of [background evidence] for the limited purpose for which it was offered. [Citations] As said by the Supreme Court in *Federal Trade Commission* v. *Cement Institute*, 332 U.S. 683 . . . [such evidence] may "nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *Paramount Cap Mfg. Co.* v. *NLRB* (8th Cir. 1958) 260 F.2d 109, 113 [43 LRRM 2017].

We find it unnecessary to consider Respondent's exception to the ALO's reliance on contract administration problems that arose between the parties as we are not relying on such evidence in our determination of the issues in this matter.

Respondent first excepts to the ALO's conclusions that Respondent instigated and assisted the employees' decertification efforts, in violation of section 1153(a) of the Act. Since instigation and unlawful assistance are separate concepts, *American Door Company* (1970) 181 NLRB 37, 44 [73 LRRM 1305], we shall analyze the evidence as to each separately. While we conclude that the record does not warrant the ALO's conclusion as to instigation, it amply supports his conclusion as to unlawful assistance.

The ALO inferred the fact of instigation from his consideration of a number of factors, including doubts about whether the Petitioners were sufficiently motivated to undertake such a campaign. Both men, however, resisted joining the union pursuant to the contract's union security clause and although Cruz finally did join the union, he did so only after he was threatened with the loss of his job; Castellanos never did join and was discharged. While there is some doubt about the veracity of Castellanos' version of how he came to know about decertification procedures,[5] in view of Petitioners' trial-and-error approach in getting the petition underway and of the disaffection of Respondent's regular employees for the union, the evidence falls short of establishing that Respondent implanted the idea of decertification in the minds of Petitioners. See, e.g., *Sperry Gyroscope* (1962) 136 NLRB 294 [49 LRRM 1766]; *Wahoo Packing Company* (1966) 161 NLRB 174 [63 LRRM 1290]; *NLRB* v. *Birmingham Publishing Co.* (5th Cir. 1959) 262 F.2d 2 [43 LRRM 2270]; *Sky Wolf Sales d/b/a Pacific Industries of San Jose* (1971) 189 NLRB 933 [77 LRRM 1411], enf'd, *NLRB* v. *Sky Wolf Sales* (1972) 470 F.2d 827.

There is, however, ample evidence of Respondent's unlawful assistance to the employees in their decertification efforts. In considering such evidence, we first note that " . . . in a case of this kind, involving a charge of violations of the duty not to maintain a forbidden relation, a reliance on so-called circumstantial evidence is not only permissible, but often essential. On the very nature of such a case, there will seldom be discoverable data showing direct statements by a party charged with violation that he has performed improper acts." *Sperry Gyroscope* v. *NLRB* (2d Cir. 1942) 129 F.2d 922 [10 LRRM 811]. In this case, the circumstantial evidence is of two kinds: the first goes to

[5] Doubts about Castellanos' version of how he learned about decertifying a union do not necessarily provide proof of Respondent's instigation. Even assuming that Respondent told him about the procedure, it would not be an unfair labor practice unless Respondent initiated the idea for the decertification campaign. *Southeast Ohio Egg Producers* (1956) 116 NLRB 1076 [38 LRRM 1406].

prove that the leading proponents of the decertification petition were provided leaves of absence and other benefits to facilitate their conduct, or as a result of their conduct, of the campaign; the second goes to prove that Respondent's agents assembled its employees for the purpose of obtaining signatures on the various decertification petitions.[6]

The record supports the ALO's finding that Cruz was personally assisted by Respondent.[7] His extended absence from work to circulate the petitions, his receipt of a Christmas bonus well in excess of any bonus received by the other tractor drivers, Respondent's allowing him to charge Respondent for the broken glass on his car and waiting to deduct the cost from his paycheck until shortly before the hearing, and his eligibility for insurance even though he did not work enough hours during the month he was circulating the petition to entitle him to coverage are all factors which support the conclusion that Respondent not only permitted Cruz to campaign, but also abetted him in his decertification efforts by insuring that he lost nothing because of the time he spent campaigning.

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[6] Apparently on the theory that unlawful interference by assistance to decertification efforts can be found only with respect to the petition which resulted in the election in this case. Petitioners separately have excepted to the ALO's consideration of the entire course of the campaign in finding unlawful assistance. Petitioners cite no authority in support of their theory that we may look only to the successful part of the campaign; indeed, the cases indicate the contrary. See, e.g., *Muncy Corp.* (1974) 211 NLRB 263 [87 LRRM 1157] *Sky Wolf Sales d/b/a Pacific Industries of San Jose, supra*, 189 NLRB 933 [77 LRRM 1411].

[7] We omit making any findings with respect to special consideration given Castellanos for the following reasons: first, unlike Cruz, Castellanos participated only briefly in the campaign, having been discharged pursuant to the contract's union security clause after the circulation of the first decertification petition; second, there is no evidence of the amount of Castellanos' bonus; finally, although both Castellanos and Ben Abatti went to some lengths to conceal the fact that Ben Abatti gave Castellanos a job tending Abatti cattle at a feedlot after his discharge, the fact of that hire itself is not persuasive proof of special consideration.

Respondent attempts to dispel the inference of unlawful interference readily drawn from these facts by pointing to evidence of its "liberal" leave policy, its history of largess to employees in emergencies and its practice of permitting employees to charge personal items. Respondent's ordinary practices differ sufficiently from its treatment of Cruz in these respects to compel the conclusion that Cruz received special favorable treatment because of his involvement in the decertification campaign. Thus, Respondent's treatment of Rosa Briseno's leaves for union business stands in stark contrast to its assertions of a "liberal" leave policy with respect to an employee's concerted activities. Its failure to deduct from Cruz' pay the cost of repair to his auto immediately after it was incurred is also atypical, as is the size of the Christmas bonus it gave Cruz.

Finally, there is the matter of Respondent's making the arrangements which resulted in Petitioners' being represented by counsel. Although the Act cannot require an employer to refuse to respond to employee inquiry, *Moore Drop Forging Company* (1954) 108 NLRB 32 [33 LRRM 1465], *Belden Brick Company* (1955) 114 NLRB 52 [36 LRRM 1504], the evidence in this case shows that Respondent went well beyond merely naming or suggesting a lawyer whom Petitioners might consult; it brought Petitioners and counsel together.[8]

We also agree with the ALO that Jose Rios unlawfully assisted in circulating the decertification petition and that Respondent's giving a Christmas party, at which time the decertification petition was circulated in the presence of its

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[8] *Vernon Manufacturing Co.* (1974) 214 NLRB 285 [87 LRRM 1516], does not prevent our concluding that, on the facts of this case, Respondent's actions in procuring counsel for Petitioners violated the Act. In *Vernon*, the national board refused to find procurement of an outside attorney violative of the Act, but it did so because of the absence of any evidence as to the relationship between the petitioner's attorney and respondents. Although the attorney recommended to Petitioners by Respondent was not its own counsel, the initial meeting between Petitioners and their counsel was arranged by Jim House who transported Cruz to his father-in-law's home where Cruz met Slovak, the attorney. After Slovak enters the case, Respondent gave a Christmas party at which Slovak circulated the decertification petition.

supervisors, also constituted unlawful support of the decertification effort. With respect to the campaigning in the fields, the evidence is, as the ALO notes, sharply conflicting. The ALO resolved these conflicts in conformity with his credibility resolutions and based on our review of the record we defer to his conclusions.

The ALO concluded that Respondent violated Labor Code section 1153(e) by its general refusal to bargain, and over reinstatement of the medical plan in particular, after the decertification election. Respondent contests the ALO's conclusions principally[9] on the grounds that it had good faith doubt about the union's continuing majority status as a result of the decertification election.

In light of our finding of unlawful assistance, we do not face the question whether an employer may rely on good faith doubt of majority status when a decertification petition raises a real question concerning representation. The general rule is that there is no good faith in a doubt which an employer has manufactured:

> (Respondent) cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of the majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such by their own free will. *Medo Photo Corp.* v. *NLRB* (1944) 321 U.S. 678, 687 [14 LRRM 581].

The rule applies with equal force to decertification campaigns: an employer that has orchestrated "a union-busting campaign

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[9] Respondent also contends that the union waived its right to bargain over reinstatement of the medical plan when it failed to respond to its concerns over the lapse of medical coverage upon the expiration of the contract. However, we find Ben Abatti's admission that he did not *intend* to bargain over reinstatement of the medical plan to be conclusive on the issue of Respondent's lack of good faith in raising the issue of the lapse of coverage.

cannot rely on the pendency of a decertification petition or the loss of majority status to justify . . . [its] refusal to bargain." *NLRB* v. *Maywood Plant of Grede Plastics* (D.C. Cir. 1980) 628 F.2d 1, 5 [104 LRRM 2646].

Respondent excepts to the ALO's conclusions that it violated the Act: (1) by failing to bargain over discontinuing the rapini crop; and (2) by making its crews available to Albert Studer in order to disenfranchise them.

Because we are dismissing the Petition for Decertification in this case, the question whether Respondent transferred its crews to Albert Studer in order to disenfrancise them is moot and we decline to address it. However, we reject Respondent's contention that it did not violate the Act when it discontinued the rapini crop. In so doing, we do not adopt the legal analysis of the ALO which depends so much on the partial-closing cases now overruled by *First National Maintenance Corp.* v. *NLRB* (1981) 101 S.Ct. 2573 [107 LRRM 2705]. Instead, our conclusion is based upon our finding that Respondent's motivation for discontinuing the rapini was discriminatory. Accordingly, we do not reach the question of the scope of the duty to bargain over crop decisions which are economically motivated.

For more than a dozen years preceding the 1978 harvest season, Abatti Farms grew rapini, one of two growers in the Imperial Valley to do so. Rapini, a member of the broccoli family, is a labor intensive crop, requiring a harvest force of approximately 140 employees. It is a winter crop, with harvesting beginning in early December and continuing through January and February. It is also a delicate crop which turns to flower if not harvested when ready, unlike other leaf crops, such as lettuce, for example, which permit greater leeway in beginning the harvest.

When called as an adverse witness, Ben Abatti gave several reasons for his decision to discontinue the crop: he was not making any money on it; he had independently decided to increase his acreage in other crops so that he did not have

enough land left for it; and, finally, the rapini market was volatile and did not offer as sure money as the other crops to which he was devoting more acreage. When called by his own counsel, however, he gave other reasons for his decision not to grow rapini: one was that he was generally trying to reduce his acreage in labor intensive crops in order to decrease his vulnerability to strikes,[10] and the second was that he was having some tax problems and he wanted to reduce his distractions. Although he later denied that "strikeproofing" figured in his decision to discontinue rapini, Respondent now insists in its exceptions that "strikeproofing" was one of the major reasons for discontinuing the crop.

Jim House, Ben Abatti's second-in-command, essentially corroborated Ben Abatti's strikeproofing defense. House testified that both before and after the contract with the UFW was signed, he and Ben Abatti discussed the company's vulnerability to strikes with respect to some of the more perishable crops, such as rapini, lettuce, and melons, and that, in general, he advised Ben to avoid planting too many acres of such crops. Respondent did, in fact, cut back on lettuce,[11] on cantaloupes and watermelons (although increasing its acreage on honeydew because it has a longer field life), and on onions (although the decision to cut back on onions was apparently motivated by increased competition from other sources). We thus find that Respondent decided not to grow rapini as a form of "strikeproofing."[12]

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[10] When grown by Respondent, rapini was harvested by Ponfilo Avina's and Frank Preciado's crews, both of which had been involved in strikes against Respondent.

[11] Lettuce apparently has a longer field life than rapini and consequently is not so vulnerable to strikes.

[12] Our finding that Respondent was motivated by the desire to gain a measure of strike protection is not contradicted by Respondent's other explanations. If, as Ben Abatti testified, the volatility of the market makes growing rapini a gamble, the possibility of a strike during harvesting would increase the odds against him on an already comparatively risky venture. Similarly, why rapini in particular would be a distraction during Ben Abatti's tax troubles *except for* its vulnerability to a strike is not otherwise explained. Finally, Ben Abatti's testimony that he increased his acreage in other crops is explained by Jim House as related to Respondent's attempt at strikeproofing.

Albert Studer, Ben Abatti's brother-in-law and an Abatti supervisor, testified that Ben approached him to take over the crop. Although Ben Abatti testified that he made his decision not to grow rapini in April of 1978 (prior to his contract with the UFW which was signed June 7, 1978), Studer testified he decided to take over the crop in the "summer" of 1978. In view of Ben Abatti's testimony that he decided to discontinue rapini because of his fear of a strike, it seems more likely than not that he made his "final" decision not to grow the crop *after* he signed the contract with the UFW. The contract was due to expire January 1, 1979, in the middle of the rapini harvest, when he would be most susceptible to the economic pressures he so feared.

There is no question that an employer may take measures to protect his business in the face of a strike, but its prerogatives in this area do not extend to what amounts, in this case, to a preemptive layoff.[13]

> An employer is not prohibited from taking reasonable measures, including closing down his plant, when such measures are, under the circumstances, necessary for the avoidance of economic loss or business disruption attendant upon a strike. This right may, under some circumstances, embrace the curtailment of operations before the precise moment the strike has occurred. The pedestrian need not wait to be struck before leaping for the curb. The nature of the measures taken, the objective, the timing, the

[13] Respondent has presented no evidence that its crews which ordinarily harvested rapini would have any unit work available to them had they not been sent to Albert Studer's fields. Indeed, Respondent continues to insist that it was merely fortuitous that its crews were available for Studer's use; however, it was possible for Respondent to meet such a "fortuity" only if it did not need the employees. The rapini harvest begins sometime in early December and goes through January and February so that, even if we were to credit Respondent's version that a freeze cut short its melon harvest and accounted for his crews' availability at the beginning of the harvest, only the fact that no work was available at Abatti during the next months could account for their continued availability. Albert Studer testified that the crews would have been laid off if they had not gone to the rapini.

> reality of the strike threat and the degree of resultant restriction on the effectiveness of the concerted activity, are all matters to be weighed in determining the reasonableness under the circumstances; and the ultimate legality of the employer's action. *Manifestly, when there is no real strike threat... there is no objective need for protective measures.* (Emphasis added.) *Betts Cadillac Olds, Inc.* (1951) 96 NLRB 268, 286 [28 LRRM 1509].

See also *American River Touring Association d/b/a Elliot River Tours* (1979) 246 NLRB No. 149 [103 LRRM 1095] (subcontracting not violative of the Act in view of an *imminent* strike threat); *Industrial Fabricating, Inc.* (1957) 119 NLRB 162 [41 LRRM 1038] (Respondents violated the Act by laying off employees in "anticipation of a strike" when they could not reasonably believe they were confronted with an imminent strike situation). The mere possibility of a strike relied upon by Respondent cannot justify its elimination of unit work: "One of the purposes of the Labor Relations Act is to prohibit the discriminatory use of economic weapons in an effort to gain future benefits." *Textile Workers* v. *Darlington Manufacturing Co.* (1965) 380 U.S. 263, 271 [58 LRRM 2657].

The Fernandez Layoffs

All parties except to the ALO's conclusions regarding the layoffs in the Fernandez group.

Although we reject Respondent's contention that the layoffs were lawfully motivated, we consider well taken General Counsel's and Charging Party's contention that the layoff of Salas, Torres and Valdez was a device to lend plausibility to Rios' discriminatory treatment of Clemente Fernandez and his group. We need not repeat the ALO's detailed and exacting analysis of the record which warrants his conclusion as to Respondent's motives in laying off members of the Fernandez family. The credited evidence amply supports his conclusion.

According to the list Respondent used to justify the layoffs by seniority, Francisco Salas has the same seniority date as the

Fernandezes while Maria Valdez and Maria Torres have later dates; thus, if Rios were laying off by seniority, Salas, Valdez and Torres would have had to go, too. Having concluded that seniority was a pretext for laying off the Fernandezes, it follows that the others were unlawfully laid off.[14] *NLRB* v. *Jack August Enterprises, Inc.* (1978) 583 F.2d 575 [99 LRRM 2582]; *D. V. Copying and Printing* (1979) 240 NLRB 1277 [100 LRRM 1531].

The Discipline of Rosa Briseno

Respondent excepts to the ALO's conclusion that it discriminated against Rosa Briseno. We agree that the ALO's conclusion, based on his finding that Respondent's treatment of Briseno stands in stark contrast to its treatment of Cruz and Eva Donate. Respondent's purported motivation simply amounts to a declaration that it would require the union to observe the contract to the last detail, while the record of this case otherwise presents a picture of its own attempts to evade it by supporting the decertification drive, by its discriminatory elimination of unit work and by its discriminatory treatment of other union adherents.

The Cutback in Work Hours

We agree with the ALO's conclusion that there is insufficient evidence to support a finding of discrimination as to the alleged "cutback" in the hours of the Palacios crew. We thus affirm his dismissal of that portion of the complaint.

The Lettuce Bonus

We agree with the ALO that no evidence supports the conclusion that the 10 percent bonus paid to the lettuce workers was linked to the decertification campaign.

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[14] General Counsel only excepts to the failure to find that Salas and Torres were discriminated against, apparently because Valdez went to work the next day in another crew. Whether Valdez suffered any damage as a result of Rios' laying her off is a matter for compliance proceedings.

DISMISSAL OF PETITION FOR DECERTIFICATION

Because of Respondent's support and assistance of the decertification campaign, the Petition for Decertification shall be, and it hereby is, dismissed.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Abatti Farms and Abatti Produce, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, laying off, suspending, eliminating the seniority or the work of, or otherwise discriminating against, any agricultural employee because of his or her union activities or sympathies;

(b) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of its agricultural employees.

(c) Changing any terms or conditions of employment of its employees without first notifying the United Farm Workers of America, AFL-CIO, of the proposed change and affording the UFW a chance to negotiate about it.

(d) Assisting or supporting any agricultural employee(s) in an effort to decertify its employees' certified bargaining representative.

(e) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of their rights guaranteed by Labor Code section 1152.

2. Take the following affirmative actions which are deemed necessary to effectuate the purposes of the Act:

(a) Offer Clemente Fernandez, Gregoria Fernandez, Jose Armando Fernandez, Francisco Salas, Maria de La Luz Torres and Maria Valdez full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority rights or other employment rights and privileges and make them whole for any loss of pay or other economic loss they have suffered as a result of their discharge or layoff, reimbursement to be made in accordance with the formula established by the Board in *J & L Farms* (Aug. 12, 1980) 6 ALRB No. 43, plus interest at a rate of seven percent per annum.

(b) Restore the full and complete seniority of Rosa Briseno and make her whole for any loss of pay and other economic losses she has suffered as a result of her suspension, plus interest on such sums at the rate of seven percent per annum.

(c) Make whole its employees for any loss of pay or other economic losses they have suffered as a result of Respondent's discontinuance of the rapini crop (1978) plus interest on such sums at the rate of seven percent per annum.

(d) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees.

(e) Make whole all agricultural employees employed by Respondent in the appropriate bargaining unit at any time during the period of December 27, 1978, to the date on which Respondent commences bargaining which results in a contract or a bona fide impasse, for all losses of pay or other economic losses they have incurred as a result of Respondent's refusal to bargain in accordance with the formula set forth in *Adam Dairy, dba Rancho Dos Rios* (Apr. 26, 1978) 4 ALRB No. 24, plus interest computed at seven percent per annum. See

Highland Ranch v. *Agricultural Labor Relations Board* (1981) 29 Cal.3d 838, cf. *Masaji Eto* v. *Agricultural Labor Relations Board* (1981) 122 Cal.App.3d 41.

(f) Permit UFW representatives to take access to its properties in accordance with the terms of the contract which expired about January 1979 until such time as a new collective bargaining agreement is entered into or until the parties bargain to a bona fide impasse.

(g) Preserve and, upon request, make available to this Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the back-pay period and the amount of back pay due under the terms of this Order.

(h) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(i) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time from November 23, 1978, to the date of issuance of this Order.

(j) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its premises, the period and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(k) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading,

the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(l) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: October 28, 1981

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

ALFRED H. SONG, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by: (1) supporting and assisting the decertification campaign; (2) refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW); (3) discriminating against the rapini crew in order to discourage union membership; (4) suspending and eliminating the seniority of Rosa Briseno because of her union activity or support; (5) laying off or discharging Clemente Fernandez and Gregoria Fernandez, on account of their union activity and support; and (6) laying off Juan Armando Fernandez, Francisco Salas, Maria Valdez and Maria de La Luz Torres as a disguise for our laying off of Clemente Fernandez and Gregoria Fernandez.

The Agricultural Labor Relations Board has told us to send out and post this Notice. We will do what the Board has ordered us to do. We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT lay off, suspend, eliminate the seniority of, discharge or otherwise discriminate against any employee in regard to his or her employment because he or she has joined or supported the UFW or any other labor organization, nor will we discontinue any crop in order to prevent or discourage employees from engaging in a lawful economic strike.

WE WILL NOT support or assist any decertification campaign.

WE WILL NOT refuse to bargain collectively with the United Farm Workers of America.

WE WILL offer to reinstate Clemente Fernandez, Gregoria Fernandez, Jose Armando Fernandez, Francisco Salas, Maria Valdez, and Maria de La Luz Torres in their previous work, or in the substantially equivalent jobs, without loss of seniority or other rights or privileges, and we will reimburse them for any loss of pay and other money losses they incurred because we discharged or failed to hire or rehire them, plus interest at seven percent per annum.

Dated:

ABATTI FARMS, INC. and
ABATTI PRODUCE, INC.

By:_____
Representative Title

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California. The telephone number is (714) 353-2130.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Abatti Farms, Inc. and Abatti Produce, Inc.
7 ALRB No. 36
Case Nos. 78-RD-2-E
78-CE-53/53-1/53-2/55/56/58/60/60-1/61-E
79-CE-5-EC

ALO DECISION

After the UFW was certified as the collective bargaining representative of Respondent's employees, the parties entered into a six-month collective bargaining agreement which expired on December 31, 1978. On December 27, 1978, a decertification election was held among Respondent's employees. Based on unfair labor practice charges filed by the UFW, a complaint issued, alleging that Respondent instigated, supported, and assisted the decertification campaign, discriminated against certain employees because of their support of the UFW, unilaterally discontinued a crop without bargaining over the decision, and refused to bargain with the Union following the election.

The ALO concluded that Respondent: (1) either instigated the decertification drive and/or unlawfully supported it; (2) discriminated against certain UFW supporters by laying some of them off, using seniority as a pretext, and by reducing the pay and seniority of another; (3) refused to bargain over its discontinuance of the rapini crop and thereby discriminated against its harvest employees in order to disenfranchise them; and (4) refused to bargain with the UFW after the decertification election.

BOARD DECISION

The Board found that there was insufficient evidence to support a conclusion that Respondent instigated the decertification petition but that ample evidence supported the allegation of employer support and assistance. The Board also found that Respondent unlawfully laid off two employees because of their

support for the UFW and laid off four others as a disguise for the layoff of the union supporters. Without reaching the question of an employer's obligation to bargain over economically motivated crop decisions, the Board found that Respondent discontinued its rapini crop as insurance against a possible strike without having any grounds to believe a strike was imminent. The Board held that such action was discriminatorily motivated. In view of its finding that Respondent supported and assisted the decertification campaign, the Board concluded that Respondent's refusals to bargain with the union subsequent to the decertification election were unlawful.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

ABATTI FARMS, INC., and ABATTI PRODUCE, INC. *Respondent/Employer,* and UNITED FARM WORKERS OF AMERICA, AFL-CIO, *Charging Party,* and TORIBIO CRUZ and JOSE DONATE, *Petitioners/Intervenors.*	Case Nos.	78-CE-53-E 78-CE-53-1-E 78-CE-53-2-E 78-CE-55-E 78-CE-56-E 78-CE-58-E 78-CE-60-E 78-CE-60-1-E 78-CE-61-E 79-CE-5-EC 78-RD-2-E

APPEARANCES:

—For the General Counsel, Barbara Dudley and Octavio Aguilar

—For the Respondent, Thomas A. Nassif and Scott A. Wilson, of Byrd, Sturdevant, Nassif & Pinney, of El Centro, California

—For the Charging Party, Carlos M. Alcala, of Salinas, California

—For the Petitioners, Thomas S. Slovack, of Best, Best & Krieger, of Palm Springs, California

DECISION

STATEMENT OF THE CASE

David C. Nevins, Administrative Law Officer: This case heard by me in El Centro, California, the trial beginning on May 8 and ending on July 4, 1979. This case is a consolidated proceeding, involving unfair labor practice charges, election objections, and challenged ballots. The unfair labor practice charges and the election objections were filed by the United Farm Workers of America, AFL-CIO (hereafter the "UFW"); the Respondent is Abatti Farms, Inc., and Abatti Produce, Inc., a joint employer (hereafter referred to as the "Respondent" or the "Company").[1] Many of the allegations in this proceeding relate to the decertification election held among Respondent's employees on December 27, 1978[2]; those employees who were so named or who were the main participants in the decertification petition drive, Toribio Cruz, Manuel Castellanos, and Jose Donate intervened in and were represented at the proceeding (they are referred to jointly as the "Petitioners").

All parties, including the UFW and the Petitioners, were represented at the hearing and were given a full opportunity to participate in the proceedings. All four parties filed briefs after the close of the hearing. The following findings and conclusions are based upon the entire record, including the observation of the demeanor of the witnesses and consideration of the respective arguments and briefs of the parties.

THE PLEADINGS

This proceeding is based, in part, on the General Counsel's unfair labor practice complaint, originally dated March 16,

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[1] In a previous case Abatti Farms and Abatti Produce were held to constitute a single employer under the provisions of the Agricultural Labor Relations Act (hereafter the "Act"). *Abatti Farms, Inc. and Abatti Produce, Inc.*, 3 ALRB No. 83 (1977). Hereinafter no distinction will be made between those two business entities, unless otherwise so stated. The Respondent stipulated at the hearing that the unfair labor practice charges were timely and duly served on it.

[2] Unless otherwise specified, all dates herein refer to 1978.

1979, and amended in writing for the second time on May 10, 1979. Certain other amendments or deletions to the complaint were made at the hearing. In general, the complaint, as amended, charges that the Respondent engaged in the following conduct:

1. That it violated Section 1153(a) of the Act by assisting, supporting, and instigating the Petitioners' decertification efforts through providing the Petitioners with extraordinary individual benefits and inducements, through assisting the Petitioners in their gathering of support for the decertification petition, and through threatening and promising benefits to other employees in order to gain their support for the decertification effort. The charges with respect to the Respondent's purported support of and assistance to the decertification effort were amplified and made more specific through a bill of particulars submitted by the General Counsel during the first few days of the hearing.

2. That Respondent violated Section 1153(c) by discriminating against certain supporters of the UFW by discharging them from their employment, taking away one UFW supporter's pay and seniority, and by decreasing the workhours of an entire work crew that supported the UFW.

3. That Respondent violated Section 1153(a), (c) and (e) by its unilateral discontinuance of a major, labor intensive crop, the rapini crop, without bargaining with the UFW over the discontinuance, which discontinuance resulted in the disenfranchisement of some 98 voters in the decertification election.[3]

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[3] The discontinuance of the rapini crop is challenged by both the complaint and the UFW's election objections, and, in addition, the disenfranchisement of 98 voters is a major issue in the challenged ballot portion of this proceeding. Although the harvesting of rapini involved a maximum of some 120 or 130 employees, only 98 of them cast ballots in the decertification election, ballots which were challenged. The Regional Director's report on the challenged ballots did not resolve whether the 98 rapini employees' ballots should be counted.

4. That the Respondent violated Section 1153(e) of the Act by refusing to recognize and bargain with the UFW following the decertification election held on December 27.

The UFW's election objections essentially charge the Respondent with the same conduct as does the complaint. In addition, however, the UFW originally alleged that the Respondent improperly designated confidential employees as election observers and that such conduct affected the election's outcome. Although certain facts were adduced at the trial concerning the election observer issue, the UFW has failed to raise this issue in its post-hearing brief. This issue, accordingly, is considered as having been withdrawn as an issue; in any event, the evidence failed to demonstrate that the employees designated as observers were confidential employees or that any impropriety existed in Respondent's designation of them as election observers.

The Respondent denies that it engaged in any unfair labor practice or other conduct objectionable in connection with the decertification election. The Petitioners also deny that any unlawful conduct existed or that any of Respondent's conduct, even if found unlawful, is sufficient to warrant disregard of the decertification election results.

FINDINGS OF FACT AND CONCLUSIONS [4]

I

BACKGROUND

The Respondent is composed of two basic entities: Abatti Farms, Inc., is the entity engaged in growing the farm crops (i.e., cultivation, irrigation, weeding and thinning), and Abatti Produce, Inc., is the entity engaged in harvesting, packaging and selling the farm crops. (Abatti Brothers is a separate legal entity which "owns" the crops.) The Respondent owns and

[4] This general section relates to the unfair labor practice complaint and to the UFW's election objections. A separate section is set forth later that relates to the remaining challenging ballot issues.

leases some 14,000 acres of land in the Imperial Valley and grows and harvests a host of row crops, such as melons, lettuce, carrots, onions, sugar beets, cotton, wheat, alfalfa, asparagus, cabbage, and rapini (also known as "broccoli rabe"). Ben Abatti is president of Abatti Produce and his brother, Tony Abatti, is president of Abatti Farms, although it is Ben Abatti who effectively determines the policy of both entities and is their chief management force. Agnes Poloni, Ben Abatti's sister, is the secretary-treasurer of the two corporate entities and is the Respondent's chief bookkeeper. At its peak periods the Respondent employs approximately 500 farm workers.

In a representation election conducted on January 28, 1976, a majority of Respondent's employees voted to select the UFW as their bargaining representative. Their selection was certified by the Board on November 18, 1977. *Abatti Farms, Inc.*, 3 ALRB No. 83. The UFW and Respondent signed their first collective bargaining agreement on June 7, 1978; that agreement's expiration date was January 1, 1979. The decertification election now in controversy was held on December 27, 1978, and the tally of the ballots for that election reflected the following:

UFW	125 votes
No Union	149 votes
Challenged Ballots	121 votes[5]

The Respondent's conduct and animus toward the UFW is the subject of not only this proceeding but of a prior one as well. In its recent decision, the Board concluded that in the past Respondent committed serious and numerous unfair labor practices against supporters of the UFW, including such conduct as denying UFW organizers lawful access to its property,

[5] Of those 121 challenged ballots, 98 were cast by the rapini harvest employees. In his report dated March 23, 1979, the Regional Director resolves seven challenged ballots and no further issue remains concerning that determination. Thus, 114 challenged ballots remain in the issue in this proceeding. There was also one void ballot cast in the election.

threatening supporters of the UFW, interrogating such supporters, and discharging and/or refusing to rehire some 13 employees who supported the UFW; that unlawful conduct occurred in connection with the 1976 organizational campaign and representation election. *Abatti Farms, Inc.*, 5 ALRB No. 34 (1979).[6] Two of those workers who were found to have been unlawfully discharged by the Respondent, Elena Solano and Jesus Solano, wife and husband, worked in the crew of Foreman Jose Rios, who is herein alleged to have unlawfully laid off or discharged some five other crew members (including Clemente Fernandez, the crew's UFW representative, and his wife and son).[7]

The Respondent's short-lived contractual relations with the UFW were less than amicable. When the contract was initially signed on June 7, Ben Abatti refused to jointly appear with the UFW's representatives for the signing; rather, he individually signed the contract and immediately departed. Admittedly, Mr. Abatti was not pleased about having a contract with the UFW.

From the outset of their contractual relations, problems arose between the Respondent and UFW which can only be deemed obstructive to the collective bargaining process. First, on his initial few visits in July to the Company's shop area, Victor Gonzalez, a UFW contract administrator, was forced off the Company's property by Tony Abatti, who on two occasions used profanity toward Gonzalez in ordering him to leave the premises and on one occasion threateningly drove his truck to

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[6] The Board's decision in the previous unfair labor practice proceeding was issued on May 9, 1979, one day after the instant proceeding commenced, and in large part reversed the findings of the Administrative Law Officer. The Respondent has appealed from the Board's decision. *Abatti Farms, Inc.* v. *A.L.R.B.*, 4 Civil 18961 (Dist. Four, Div. One).

[7] As will be discussed later in full detail, on May 10, 1979, one day after the Board issued its unfair labor practice findings, Jose Rios pistol-whipped and shot Jesus Solano in front of Rios' home in Mexicali, Mexico. As will be later noted, I have concluded that this physical assault by Rios was motivated by his anger at the just released unfair labor practice findings in Solano's favor and that such motivation should be considered when evaluating Respondent's conduct *vis-a-vis* other UFW supporters.

within a foot of where Gonzalez was standing.[8] Gonzalez had gone to the shop in an effort to get the Company's employees to sign up as members of the UFW, such membership being required by the UFW's contract.

A second and more generalized problem that existed between the UFW and the Respondent was the refusal of large numbers of employees to join the UFW as required by the collective bargaining agreement. As early as July, the UFW began complaining to the Respondent that workers were not becoming UFW members and urged the Respondent to either cooperate so that they did become members or so they were discharged pursuant to the contract. As late as July 28, Ben Abatti informed Gonzalez that he would not discharge employees who refused to join the UFW and, after Gonzalez unsuccessfully attempted to hand him a grievance protesting the employees' failure to join and then threw the grievance on the ground at Abatti's feet, told Gonzalez to get his ass off the Company's property. By mid-October the UFW identified some 124 employees who had still refused to become members as required by contract.[9]

Another general problem concerning the parties' contractual relations was the failure to provide an employees' seniority list. By contractual supplement the parties were to "cooperate to formulate appropriate senority lists within thirty (30) days of execution of" the June 7 agreement. The UFW

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[8] The Company's shop was located at McCabe and Pitzer Roads and is the location where the tractor drivers, irrigators, and shovel crews report each morning for their work instructions. There were approximately 95 such steady employees.

[9] On September 11 the UFW and Respondent entered into a "grievance settlement agreement" which purported to resolve some six outstanding grievances, due to be heard in arbitration that same day. One of those grievances related to the Company's refusal to discharge workers who refused to join the UFW, and was settled by the Company promising to meet with such workers and inform them of the requirement to join "or the Company shall be required to terminate them upon receiving written notification from the Union." Such terminations had not taken place as of October 19, when the UFW informed the Company of 124 employees who still refused to join, nor as of October 23 or 24 when there still remained approximately 100 such employees.

never received any such seniority lists from the Company until late November or early December, although the Company had agreed in the September 11 grievance settlement to compile such seniority lists "within a reasonable time." Although the Company's chief labor relations representative, Jim House, explained the long delay in compiling such seniority lists by claiming that the UFW failed to assist in their compilation, it is not clear just how the UFW was expected to assist, particularly in view of the Company's contemporaneous refusal to provide the UFW with current lists of its employees, their job classifications, addresses, and social security numbers, as also called for by the contract (a refusal that was also made subject to a formal grievance by the UFW).[10]

Although the Respondent seeks to minimize the importance of its conduct in respect to providing timely employees lists and seniority lists and in the failure of employees to timely join the UFW, the general conclusion emerges that Respondent made little or no active effort to satisfy certain basic contractual requirements. Its nonchalance and lack of effort to cooperate in meeting the legitimate contractual demands of the UFW reflect an attitude of recalcitrance and animus toward the employees' duly elected bargaining representative. It is upon this background of the Employer's contractual delay and avoidance that the events surrounding the decertification campaign unfolded.

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[10] It is quite true, as claimed by the Respondent, that compiling all the appropriate seniority lists was no minor feat, particularly inasmuch as the yearly turnover in employment saw some 1,500 to 2,000 employees come and go. But that large turnover can hardly explain the absence of any meaningful attempt for some five months to provide seniority lists even for those crews which were then currently and regularly employed. Although the entire seniority information necessary for the employees hired prior to 1973 was not readily available on forms kept by the Company, no apparent effort was made to use what record information there was then available and supplement it with other available records and personal contact with the current employees. Indeed, the Company did provide seniority lists in late November or early in December, and no great difficulty then existed (at least as noted in the evidence) for the office clerk who compiled them immediately upon Jim House's request.

II

THE ASSISTANCE AND SUPPORT GIVEN TO PETITIONERS' DECERTIFICATION EFFORT

A. The Petitioners.

Two employees have been singled out by the evidence as having spear-headed the initial decertification effort: Manuel Castellanos and Toribio Cruz.[11] Manuel Castellanos was an irrigator, a year-round, steady employee, and was employed by Respondent since 1964. Although Castellanos was involved in the initial efforts to decertify the UFW, his role in the decertification campaign cannot be easily described.

According to Castellanos, he single-handedly began to gather signatures for decertification on a blank yellow paper because so many of his fellow employees (i.e., irrigators) expressed strong dislike for the UFW's existing medical insurance plan.[12] Castellanos, however, had had no personal experience with or complaints regarding the UFW's medical plan. Initially Castellanos explained that he learned about gathering signatures for decertifying a bargaining representative by overhearing a conversation on the streets of Calexico; subsequently he explained that he learned about it from overhearing a two-hour conversation among some 20 unknown workers at a shopping center outside the Agricultural Labor Relations Board office in El Centro (though he never joined in that conversation and could scarcely remember what he had overheard), where

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[11] Jose Donate along with Cruz was a named Petitioner in the decertification petition that actually led to the election, but he apparently played little or no active role in gathering support for decertification. His role and that of his wife, Eva Donate, will be discussed in later sections.

[12] The eventual decertification campaign centered, in large part, on the issue of medical insurance for the workers. Much more of this issue will be discussed *infra*.

he had gone regarding a bank loan.[13] Coincidentally, Castellanos began gathering employee signatures only days after the UFW's one-year certification period ended on November 18, and initially filed his "yellow sheet" on November 23.[14]

Castellanos did not work the entire time he gathered signatures, first on the "yellow sheet" and then on the first two petition forms given to him by Agricultural Labor Relations Board agents. According to the Company's records, Castellanos received no pay after the week of November 25. Castellanos's testimony contradicted itself as to whether or not he normally sought approval for such long absences from work, and thus no direct testimony was presented that the Respondent had authorized Castellanos to take time away from work to gather decertification signatures. Yet, according to Castellanos,

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[13] Castellanos testified in two successive days at the hearing. His testimony changed drastically from the first day to the second day, and—in effect—it was conceded that Castellanos had not told the truth during his first day's testimony.

Castellanos' testimony, often confusing and incomplete, was so self-contradictory and evasive as to establish its lack of credibility, as well as his obvious effort to evade all direct connection between himself and the Respondent's officials. His demeanor was no more convincing than the substance of his testimony.

[14] Some chronology for the events surrounding the filing of the several decertification petitions is taken from General Counsel Exhibit 58, an exhibit offered but not formally admitted into evidence, largely because the Petitioners' counsel wished to supplement the information contained in it (which was never done by counsel). Petitioner's counsel, however, indicated that the dates contained on the exhibit are correct.

All the time Castellanos began collecting signatures, the Board's existing policy (as of September 29, 1978) was that a decertification petition was timely if filed after the certification year expires and during the last month of a collective bargaining contract, when the contract's duration is for one year or less, as was true in the Respondent's case. See *M. Caratan, Inc.*, 4 ALRB No. 68, reversed ____ C.A. ____ (____). Even though Castellanos' initial decertification effort came close to meeting the standards set forth in the Board's recent *Caratan* decision, Castellanos, himself, claimed to have believed that the UFW's representation at the Company would expire when its contract expired, only some six weeks from when he began gathering signatures.

he did not return to his job until December 7, the day after the second petition (78-RD-1-E) was docketed by the Board, at which point he claimed to have been abruptly informed by his foreman that he was being discharged for having failed to join the UFW. Castellanos made no effort to then join the UFW, although the UFW's contract had only some three weeks left until its termination and although he was fully aware that a decertification effort was well underway. With unintelligible nonchalance, Castellanos admitted to thereafter having no further interest in the eventual decertification election or its date, even though this long-time employee's future re-employment with the Respondent could well hinge on the election's outcome.

Castellanos had been one of those regular, steady workers for the Company who made it a practice to get regular and sizeable advances in his pay from the Respondent and who had Ben Abatti co-sign bank loans for him. When his employment ended in December Castellanos still owed some $400.00 on one of his two co-signed loans that year and at least $95.00 for past pay advances (out of $1,225.00 in pay advances he had received during 1978).

Castellanos initially indicated that after his "discharge" he went to work at the LaBrucherie feed-lot tending cattle, that no one from the Company aided him in getting that employment, and that he received no further pay from the Company until he returned to work as an irrigator with the Company in latter February, 1979 (though he admitted receiving a Christmas bonus of $100.00 or $200.00 from the Company in December). His initial testimony squared also with the initial testimony of Ben Abatti, who indicated that he did not see Castellanos "for a long time" after his discharge, did not know his whereabouts, did not speak to him when he had seen him around the shop area in December (visits which Castellanos denied making), and did not know where Castellanos became employed except perhaps at LaBrucherie's feed-lot.

Pay advances given to Castellanos during January and February, 1979, were then used by the General Counsel for further questioning Castellanos (these involved pay advances of $425.00 on February 19, 1979, $35.00 on January 30, 1979, and $200.00 on January 4, 1979). After production of these checks, the testimony subsequently given by Castellanos and Ben Abatti changed. First Castellanos, who was then being questioned, and later Abatti, who reappeared as a witness, admitted that after his discharge, Castellanos went to work at a cattle feed-lot privately operated by Ben Abatti (the Ranney Feed Lot) with Ben Abatti's personal approval and involvement, although Castellanos's testimony places that reemployment about two days after his prior "discharge" and Abatti's testimony places that reemployment sometime during the week of December 24. Castellanos worked for Ben Abatti's feed lot until he returned to the Company as an irrigator. In any case, both Abatti and Castellanos obviously fabricated their initial testimony when denying any further connection between Castellanos and Abatti after Castellanos's December departure from the Company. In addition, the Respondent qualified Castellanos for its new medical insurance coverage during the month of January, 1979, when the evidence shows that Castellanos did not compile any qualifying work-hours in the previous month, December, as an employee of the Respondent.

Toribio Cruz was even more active in soliciting support for the decertification effort than Manuel Castellanos. Cruz began soliciting that support almost from the outset and continued throughout the campaign.[15] Mr. Cruz was primarily a tractor driver, another full-time position, and had been with the Respondent since 1965. In addition, from time-to-time, Cruz worked as a driver on a service truck, a position which Ben Abatti considered as a foreman's job and one which brought with it special coverage under the Company's supervisors'

[15] Several decertification petitions were filed with the Agricultural Labor Relations Board, including the previously mentioned "yellow" sheet. The early petitions were either not docketed or were eventually dismissed by the Agricultural Labor Relations Board. The petition eventually filed that led to the election was denominated as 78-RD-2-E and was first docketed by the Agricultural Labor Relations Board on December 19.

medical insurance program. Unlike Mr. Castellanos, Cruz spoke fluent English, but his testimony concerning his decertification involvement is nonetheless difficult to pin down.[16]

Although of no singular importance, it should be noted that Mr. Cruz was an unlikely figure to lead the decertification drive. He had never participated in any past organizational roles or in any of the past union activity that had historically occurred among Respondent's employees. He admitted in nonchalant fashion that he had no particular ill will toward the UFW and did not much care whether the UFW won the decertification election or not. He did not even wait after the election to learn of its outcome. His leadership in the decertification drive, he admitted, was largely because his fellow employees, tractor drivers and irrigators, had complained about the inferiority of the UFW's medical plan, although Cruz had had no personal experience with that insurance plan.

Yet, from latter November to latter December Mr. Cruz absented himself from his regular job, almost entirely, in order to engage in his decertification activity. The Company's earnings records for Cruz indicate that he missed work entirely during the pay periods of December 2 and 9, that he was given credit for eight hours' work during the pay period of December 16, that he worked four hours during the pay period of December 23, and that he spent 26 hours at work during the

[16] Cruz's testimony was consistently self-contradictory. On a regular basis throughout his testimony he would first state one fact and then either subsequently modify it or contradict it by stating the opposite. His demeanor gave the impression that by his testimonial responses he sought to keep his role in the decertification campaign as confusing and vague as possible and to avoid any direct connection between himself and Respondent's representatives. The description of Cruz's involvement in the decertification effort, as described in following paragraphs, is pieced together from those portions of his testimony which seem unlikely to have been misleading, facts which were testified to by others or corroborated by others, and by facts emerging from certain records introduced at the hearing.

pay period of December 30.[17] According to his testimony, he received no pay for the time missed from work. Mr. Cruz, however, did receive a special payment from Respondent of $400.00 during the pay period of December 23, which he described as a "Christmas bonus." This so-called Christmas bonus appears to have been substantially in excess of any given to his fellow employees.[18]

As to whether or not Mr. Cruz's extended absence from work to engage in his decertification activity was authorized by the Company is an issue hopelessly muddled in the record. Ben Abatti was of the opinion that a supervisor would be aware of the reasons for an extended absence from work, or at least demand an acceptable reason upon the employee's return. Indeed, Abatti claimed that if a worker was absent for an extended time (any time over a week) without a "pretty good reason" he would be subject to discharge. Yet, not one tractor foreman, nor Abatti himself when he admittedly learned later of Cruz's extended absence, sought any explanation from Cruz for his long absence. According to Cruz, he gave no explanation to anyone regarding his long absence, even though he admittedly sometimes saw his supervisors in the shop area when he was there visiting during his decertification activity.

[17] It might be noted that on December 6, the day Cruz helped file the first docketed decertification petition, he apparently left for two or three days for Mexico on an immigration matter, after the Company had provided him with an immigration letter on November 29 in order to allow his wife and family to immigrate. It should also be noted that while Cruz was credited and paid for eight hours' work on December 13 (during the December 16 pay period, the period used to determine voter eligibility for the decertification election), the facts, as noted *infra*, demonstrate that he did not work that day, thus indicating that for three successive weeks Cruz did not attend to his paying job and that during the fourth successive week he worked only four hours.

[18] The earnings records for 12 other tractor drivers were introduced into evidence at the hearing, records which covered only about 33% of the tractor drivers then employed by the Respondent. Of these 12 tractor drivers, two received a Christmas bonus of $100.00, one received a $50.00 bonus, and one received a $40.00 bonus. It thus appears that Cruz was singled out for the extremely favorable treatment in late December, as Castellanos also was around Christmas-time.

Albert Studer, one of two chief supervisors over the tractor drivers, recalled that he was only informed at some point that Cruz had to leave for an immigration matter. Tony Abatti, the other supervisor over tractor drivers, recalled that he saw Cruz one day in the shop area and Cruz informed him he was collecting signatures for the decertification petition.[19]

On December 13, Mr. Cruz was visited at his home in Mexicali by an Agricultural Labor Relations Board agent, who discussed with Cruz the fact that his December 6 petition had been just dismissed by the Agricultural Labor Relations Board. Concidentally, Cruz was later visited that morning by Jim House, the Company's chief labor relations official.[20] According to Cruz's uncorroborated and unbelievable testimony, he and Mr. House did not discuss during that entire visit the earlier visit from the Agricultural Labor Relations Board agent or the recent dismissal of Cruz's decertification petition; yet, immediately after House's visit, Cruz drove from Mexicali to the Company's premises, where he again met with Jim House, and plans were then laid to arrange for Cruz to be represented by an attorney.[21]

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[19] Tony Abatti initially indicated that he informed his brother, Ben, that Cruz was gathering signatures for a decertification petition. But, upon subsequent questioning by the Respondent's counsel, Tony Abatti retracted his recollection and indicated he was uncertain as to whether he informed Ben Abatti of Cruz's gathering signatures. Ben Abatti, on the the other hand, insisted he had no knowledge of the decertification drive until mid-December, when he was personally served with a copy of the petition by Cruz or Jose Donate.

[20] Cruz attempted to explain in his testimony that House visited him only in order to find out why he had been absent from work for so long. That explanation for the visit is simply incredible, in view of House's labor relations position with the Company, his lack of responsibility over tractor drivers, his most unique personal visit to Cruz's home, and the sequence of events that unfolded later that day and the next. Indeed, if House was so concerned about Cruz's being absent from work, one wonders why Cruz continued to remain absent from his job for an additional 10 days after the visit.

[21] That the events described occurred on December 13 is established through the testimony of Mr. Cruz and the far more credible testimony of his counsel, Thomas Slovack.

According to Cruz, when he met with House at the Company's premises he informed House that he needed legal help. (Cruz at one point admitted telling House he needed legal assistance because of the dismissed petition, but at another point he denied explaining to House any reason as to why he needed legal assistance.) Through House's aid, Cruz then met in El Centro, at approximately 1:00 or 2:00 p.m., with one of the Respondent's labor lawyers, Scott Wilson. The two discussed legal representation for Cruz, and Wilson suggested who might assist Cruz regarding the dismissed petition. Wilson was then instrumental in contacting another attorney, Thomas Slovack, to represent Cruz.[22]

By early the next morning, December 14, Thomas Slovack had come from his law office in Palm Springs to El Centro and met with Wilson and another of Respondent's lawyers; they discussed Cruz's dismissed petition. Slovack was a management lawyer and brother-in-law of Jim House. At around noon, Mr. Cruz was driven by Jim House to House's father's home, where Cruz met with Mr. Slovack. From that point on Mr. Slovack became Cruz's attorney, handling an appeal from the Agricultural Labor Relations Board's dismissal of the first docketed petition, personally assisting in the gathering of signatures for another decertification petition, and attending the pre-election conference in place of Cruz, who admitted that he

[22] Cruz at first insisted that he was working on December 13, although subsequently he indicated that he was not working but at home that morning, after which he met with Wilson at 1:00 or 2:00 p.m. (not at lunch-time, as he originally claimed). Cruz's time card for the week in question credits him with eight hours' work on December 13, a Wednesday (as acknowledged by Agnes Poloni, the Respondent's bookkeeper, who indicated that the time card dates for the week in question refer to December 13, not the 29th as might be suggested from the face of the time card). But, from the sequence of events it is clear that Cruz did not work on the 13th. He next claimed that he worked on December 14, but the Respondent's official time card for Cruz indicates he did not work at all that day.

did not even know when the conference took place.[23] Until the decertification election took place, Slovack remained in El Centro, almost exclusively, and assisted in the decertification drive. It was also Mr. Slovack who encouraged Mr. Donate to become a named Petitioner on the last decertification petition. Throughout his pre-election representation of the Petitioners, Mr. Slovack used the office and library facilities of Respondent's lawyers and of the Imperial Valley Vegetable Growers Association (to which the Respondent belonged), without reimbursement for the use of such facilities (though reimbursement was made by Slovack's firm for any use of secretarial help, xeroxing and phone calls); Mr. Slovack admittedly discussed the Petitioners' case with Respondent's labor counsel and with Jim House, while representing the Petitioners.

Two other features of Mr. Cruz's relationship with the Respondent was established by the record. First, on December 1 he charged on Respondent's account with Jones Brothers Glass Company the installation of a new rear window in his automobile, amounting to $169.28. His rear window was damaged, he suspected, by persons affiliated with the UFW, although Mr. Cruz denied telling anyone from the Company about his suspicion. According to Tony Abatti, however, when Cruz asked permission to charge his new rear window on the Company's account, which provided him a substantial discount for the window, Cruz mentioned that he thought supporters of the UFW had destroyed the window.[24] In contrast with Tony Abatti's testimony, Cruz more-or-less refused to commit himself as to whether he asked anyone's permission to use the Com-

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[23] Slovack apparently represented Mr. Cruz, then later Mr. Castellanos and Jose Donate, on a *pro bono* basis. He continued representing them throughout the 30-day trial herein and also arranged for them (Cruz and Donate) to attend a legislative meeting in Sacramento, California, regarding decertification election issues (all at his firm's expense). By the time the instant trial herein began, it was estimated by Mr. Slovack that the value of his services had exceeded $25,000.00.

[24] Before Tony Abatti testified, Ben Abatti had claimed that Cruz asked his permission to charge the glass installation on the Company's account, but that Cruz did not mention who broke the window.

pany's charge account. Although it seems that it was not uncommon for the Company's full-time, steady employees to charge personal purchases on the Company's charge accounts, with the Company's approval, rather than having Cruz's charge immediately scheduled in for subtraction from his next paychecks, as was the normal practice, Cruz's charge began being deducted from his pay as late as April 7, 1979, some three weeks after the original complaint in this proceeding was filed.

The second feature noted in the record is the fact that as it had done with Castellanos, the Company listed Mr. Cruz as eligible for its new medical insurance coverage in January, 1979, although he did not work enough hours the prior month to qualify for such coverage. At that juncture, when Cruz was qualified for coverage by the Company, he was anticipating future medical surgery on his son's hand and other medical needs regarding his wife.[25]

B. The Decertification Campaign.

1. *Introduction.*

As earlier noted, the campaign to decertify the UFW involved the gathering of signatures on three different decertification petitions, in addition to the "yellow sheet" initially circulated by Manuel Castellanos among only the tractor drivers and irrigators. The first petition filed by Castellanos and Cruz was not docketed, the second was docketed as 78-RD-1-E on December 6 and, as noted, dismissed on December 12, and the third petition was docketed as 78-RD-2-E on December 19 and eventually led to the election on December 27. Most of the evidence adduced with respect to the Petitioners' decertification activity related to their gathering signatures on the first two petitions.

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[25] Although Respondent claims that in the past it has extended insurance coverage to other nonqualified workers who have been faithful employees, these exceptions appear to arise when expressly requested by individual employees in need, not as a matter of voluntary initiation by the Company as occurred in the case of Cruz and Castellanos.

As is highlighted below, the Petitioners' decertification activity had certain common features, irrespective of which work crew they were visiting or whose signatures they were gathering. Nonetheless, the decertification activity is discussed below in relation to the particular work crews involved.[26]

2. ***Panfilo Avina's Crew.***

Panfilo Avina has two crews working under his direction, each being led by a so-called "helper": Manuel Galindo and Trinidad Soto. Avina spends very little time directly with either crew, for he mainly observes their work while seated in his truck at some distance from the crews. Avina, or General Foreman Hernandez, normally gives the necessary work instructions to the "helpers" and they then pass them along to the crew workers. The two helpers are in the fields with the workers, observing the quality of their work, and are the ones who direct when breaks and lunch periods are taken. The two crews number approximately 22 or 23 workers apiece. During the time of the decertification petition drive these two crews were harvesting melons by machine.

Manuel Galindo's group: Toribio Cruz and Manuel Castellanos visited Galindo's work group (or crew) on two occasions, once in late November and once in early December. Several witnesses described these two visits through contradictory testimony. Based on their comparative demeanor and the substance of their testimony, I have generally credited the testimony of Jesus Tarin, a worker in Galindo's crew and still an employee with Respondent.

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[26] It was stipulated by the Respondent that the following persons were supervisors within the Act's meaning: Ray Hernandez, general foreman; Jim House, assistant to Ben Abatti and labor relations representative; and the following crew foremen: Panfilo Avina, Angel Avina (when in charge of a thinning crew during October and November), Jose Rios, Pedro Palacio, Thomas Romero, Ramon Veliz, Sr., and Pedro Padilla. It also should be noted that the Respondent denies any responsibility for statements made by Petitioners during the campaign to decertify the UFW, claiming that they were not agents of the Respondent and could not bind the Respondent by their statements.

Mr. Tarin recalled that when Cruz and Castellanos first visited the crew they waited at an edge of the field until the melon harvesting machine (and the crew which worked along with it) reached that edge. The machine and its motor were then stopped for some 15 minutes while Cruz and Castellanos talked with the crew and solicited their signatures on the decertification petition. According to Tarin's credible recollection, the machine's driver, Jouquin Lopez, dismounted the tractor and signed the petition, as did Manuel Galindo. Castellanos told the workers they were gathering signatures for a new election because the UFW's medical plan was inadequate and so that the Company could start another medical plan. Tarin's testimony indicates that the solicitation by Cruz and Castellanos took place during work time, not during break time. When they departed after 15 minutes or so the crew immediately returned to work.

Mr. Cruz claimed that his first visit occurred during a break from work, but *both* Manuel Galindo and Panfilo Avina (who observed the first decertification solicitation) denied that the machine stopped at the field's edge because of a break. Tarin recalled that Cruz and Castellanos appeared after the employees had taken their morning break. Nor does it appear that Cruz and Castellanos engaged in their campaigning merely during the time that it normally takes the harvest machine to exit the field and turn around to re-enter in the next set of rows, as suggested by Galindo and Avina. For, as Jouquin Lopez recalled, the Petitioners were there for about 15 minutes, longer than it normally takes for the machine to make its turn-around (somewhere between five to ten minutes), and the harvest machine was actually shut off while they solicited signatures, though the motor is never shut off when the machine is simply in the process of turning around. Indeed, according to Lopez, he was directed by Galindo to shut off the machine's motor.[27]

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[27] It seems to be the case with melon machine crews, as with some of the other field crews, that employees are free to visit the portable toilets or drink water at the edge of the field when the machine is turning around or before they turn back into the field and begin other work rows. But, it does not

(Footnotes continued on following page)

Cruz and Castellanos again visited Galindo's crew in early December, once again gathering signatures on a decertification petition. According to Mr. Tarin this second visit occurred early in the morning, before the employees were given their morning break. And again, Cruz and Castellanos gathered their signatures for some 15 minutes or so, while the melon machine waited at the edge of the field. When they left, the workers returned to work.

In contrast to Tarin's recollection, both Cruz and Jouquin Lopez claimed that the Petitioners' second visit took place during lunch-time. Although the matter is not free from doubt, it is fair to conclude that that visit was not during lunch, as claimed by Cruz and Lopez. Significantly, Lopez recalled that Cruz arrived when the workers were heading for their cars where they would eat their lunches, but Cruz claimed that he read the petition aloud to the workers, which seems as though it would have been impossible if they were going to or already seated in their individual cars eating. Neither Galindo nor Panfilo Avina claimed that Cruz came during lunch. In addition, Avina was not present during the second visit, although it appears to have been his common practice to visit each of his crews during the lunch break. Furthermore, had Cruz visited the crew during lunch it would have been a departure from his regular practice of soliciting signatures from the field crews during normal work hours and not during their lunch breaks.

(Footnotes continued from preceding page)

appear that the first visit of Cruz and Castellanos merely took place during a time when Galindo's machine was waiting for workers to return from the toilets or from drinking water. For one thing, their visit lasted longer than the normal turn-around time. For another thing, the melon machine does not wait for the workers when there are sufficient extras to fill in for them on the machine, which was evidently the case when Cruz and Castellanos first visited the crew. According to Jouquin Lopez the crew was full that day, meaning there were some 23 or 24 employees there, while according to him only some 17 workers are necessary to keep the machine running in the field. Furthermore, the machine coincidentally began operating immediately upon the departure of Cruz and Castellanos. Finally, the motor was shut off, which is not done when the machine is waiting for employees to return to it.

Trinidad Soto's group: The testimony surrounding Toribio Cruz's solicitations of the group of workers led by Trinidad Soto is in deep conflict among the various witnesses. The most likely scenario for those solicitations comes from a composite of the testimony.

Maria Covarrubias, the UFW's representative in the Soto group and an employee of Respondent's for nine years, described three visits made by Mr. Cruz. Her sincerity and demeanor as a witness were eminently credible; however, her testimony was occasionally confused and somewhat inconsistent as to various details and, therefore, cannot be strictly relied on. A similar impression emerged from observing the testimony of her husband, Tadeo Covarrubias, a man in his 70's and who has worked for 14 years for the Respondent.

Mrs. Covarrubias initially observed Mr. Cruz and Mr. Castellanos visiting her crew in November. On that occasion they spoke only with Trinidad Soto, for approximately 30 minutes, and then departed. According to Mrs. Covarrubias, Soto later informed her of Mr. Cruz's identity and told her that they had checked with the foreman (presumably Panfilo Avina) and were going to return to gather signatures, and that they had been sent by Ben Abatti. Soto, however, denied having such a conversation with Mrs. Covarrubias.[28] However,

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[28] Were it crucial to resolve the conflict between Soto and Mrs. Covarrubias, I would credit Mrs. Covarrubias' account, particularly since Soto's denial was delivered in a noticeably unconfident and jerky manner. A reason why one is hesitant in resolving some of the myriad credibility choices in this case is that often the witnesses called by the same party contradicted one another. As an example, we see that Panfilo Avina admitted in his testimony that on one occasion Cruz informed him prior to his solicitation that he was gathering signatures on a petition, although Cruz denied having such a conversation with Avina. To further confuse the matter, Avina, as earlier noted, described his observation of Cruz's solicitation among Galindo's crew but denied seeing him visit Soto's crew, a denial put into question not only by Tadeo Covarrubias, who described Avina as present on one occasion as talking with Cruz, but by Maria Escobeda (a witness for Respondent), who described Avina as being across the field when Cruz solicited signatures among the workers of Soto's crew, and by Soto, himself, who described Avina as being some 50 yards away when such a solicitation took place. On the other hand, neither Galindo nor his machine driver, Jouquin Lopez, placed Avina near the Galindo group when Cruz was soliciting signatures.

Soto admitted that Mr. Cruz informed him one day that he was present to talk to the workers and get support for a new election and that Soto told Cruz he could talk to the workers when the melon machine stopped at the edge of the field.

In any event, general agreement exists among the witnesses that Cruz and Castellanos came to the Soto crew and solicited petition signatures around late November or early December, on two occasions. On the first of these occasions, it is fair to conclude that the solicitation took place during work time. Mrs. Covarrubias pinpointed the visit at about 10:30 a.m., when the crew's melon machine reached the edge of the field known as La Coyote. She recalled that Soto stopped the machine and its motor, that Cruz and Castellanos gathered signatures for about 30 minutes, and that after they left the employees were given their lunch break.[29] Tadeo Covarrubias also recalled a solicitation at the La Coyote field, and although he was not sure when it occurred, he recalled that the machine was ordered shut off when Cruz was there to talk with the workers. (Mr. Covarrubias identified Panfilo Avina as the person who ordered the melon machine shut off, but it may be that when he identified Avina he meant Trinidad Soto, especially since Avina rarely spent time inside the field where he was placed by Mr. Covarrubias's testimony.) Maria Escobeda also pinpointed this first employee solicitation as being at the edge of the field, at about 10:30 a.m., and before the lunch break. Escobeda, however, indicated that the solicitation lasted only 15 minutes or so, and then the employees returned to work.[30]

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[29] Although Mrs. Covarrubias indicated that the lunch break may last one hour, this estimate is highly unlikely. The UFW contract, for example, provided that lunch breaks were to last only one-half hour (G.C. Exh. 10, p. 33).

[30] Although Escobeda indirectly implied that the machine was not shut off during Cruz's solicitation, I credit the recollection of Mr. and Mrs. Covarrubias that the machine was shut off while Cruz gathered signatures for the decertification petition. Their recollection even conforms with the implicit conclusion emerging from the testimony of Soto, who indicated that he gave Cruz permission to talk to the workers during lunch or break-time, times when the machine is normally shut off.

The next visit by Mr. Cruz to the Soto crew, about a week later, appears to have occurred during the lunch hour. While the time of his visit is not free from doubt, Mrs. Covarrubias's testimony is hopelessly muddled as to when this visit occurred, Mr. Covarrubias could not recall this visit, and Maria Escobeda pinpointed the visit as taking place during lunch. Even Mrs. Covarrubias suggested through her testimony a likelihood that this second employee solicitation occurred during or very close to the lunch break, although at other portions of her testimony she fixed the visit as taking place after lunch. In view of all the testimony, and particularly Ms. Escobeda's credible assertions in regard to the second visit, it is concluded that on this occasion Cruz solicited employees during their lunch break and not during normal work hours.

3. ***Angel Avina's Crew.***

Mr. Cruz solicited signatures for the decertification drive only one time among the crew of Angel Avina, an admitted supervisor, while that crew was engaged in thinning lettuce. It was in late November.

According to the credible testimony of one crew member, Fernando Franco,[31] the following occurred on that occasion. Cruz appeared at the edge of the field, arriving after Angel Avina's crew had returned to work following their morning break. Franco observed him speak with four crew members as they approached the edge of the field on their way to turn around into other work rows and that the four signed a paper that Cruz had with him. When Franco and his two co-workers approached the same area Cruz showed them the paper, asked

[31] The only other witness to directly testify about this solicitation was Angel Avina, whose testimony did not contradict that of Franco's. Indeed, Avina admitted that Cruz approached him and informed him he was gathering signatures for a new election so the employees could vote no; Avina also acknowledged that he gave Cruz permission to speak with the employees if he wanted. Avina indicated at one point that Cruz was present for a total of five to 10 minutes, but then later testified that he was present for only two or three minutes.

them to sign it, and explained that it was for a new election so the employees could get a better medical plan. Throughout Cruz's visit, Angel Avina stood near him and watched the transactions.

Franco recalled that he told Cruz that the employees were satisfied with the Union. Avina, still standing nearby, then told Cruz that he should return at lunch time to explain to the employees what it was all about. Mr. Cruz then left, but he never returned to the crew, apparently because even those few who had signed his petition later told him to remove their names from it.[32]

4. *Jose Rios's Crew.*

Although Toribio Cruz and Manuel Castellanos visited the crew of Jose Rios regarding the decertification drive, neither one took an active role in soliciting employee signatures and neither of them spoke with employees during work hours (except perhaps on one very minor occasion with Eva Donate). Rather, the collection of signatures from that crew, while it was in the field, was the responsibility of Eva Donate, a member of the Rios crew.

Eva Donate, not a named Petitioner, and her husband, Jose, one of the named Petitioners, both lived in rent-free housing on the Company's premises. Jose Donate had worked for Respondent since 1963, and Eva had worked on and off

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[32] The Respondent elicited testimony from several witnesses, including Panfilo and Angel Avina, to the effect that UFW representatives were circulating throughout Respondent's field prior to the decertification election, campaigning, and thus it is argued that the UFW was given as much access to the workers during work time as were the Petitioners. More will be said of this issue later, but in terms of the testimony of Panfilo and Angel Avina it should be noted that they could describe precisely only the presence of UFW representatives in the rapini fields after the rapini harvest began in early December (a harvest that both Avina crews joined) and that these representatives were investigating the matter of who the rapini crop belonged to, a major issue in this proceeding. Thus, no first-hand evidence exists that the UFW used work time to engage in election campaigning in the crews of Panfilo and Angel Avina.

since 1972. Both of them had close connections with the Abatti family, for in late 1977 Jose Donate became seriously ill and almost died, and he recovered largely through the intervention of Ben Abatti and Agnes Poloni. No evidence exists, however, that Jose or Eva Donate received any noteworthy treatment from the Respondent or its management immediately before or during the decertification drive. Nor does it appear, with but one minor exception noted below, that Eva Donate was given special consideration by Jose Rios when she solicited decertification signatures among her crew, as her solicitation activity invariably took place during non-work time.[33]

Several factual features, however, do stand out with respect to decertification activity involving the Jose Rios crew. First, on one of the occasions in late November when Mr. Cruz and Mr. Castellanos were visiting the Rios crew before work, and after Eva Donate had been gathering decertification signatures around the morning fire, she requested permission from Jose Rios to leave for a short time and, after permission was granted, she departed with Cruz and Castellanos in Cruz's car. Although it may have been unknown to Rios, Eva Donate then went to the crew of Pedro Palacio where she engaged in soliciting signatures for the decertification petition. When

[33] Two members of the Fernandez family, Clemente and his son Jose Armando, members of the Rios crew who were discharged or laid off during the decertification drive, testified to several statements made by Eva Donate to the effect that she was campaigning for decertification because Agnes Poloni had requested her to and had given her the decertification petitions and to the effect that employees who did not sign the decertification petition would be discharged. I do not place reliance on these testimonial assertions, which were denied by Eva Donate. Mrs. Donate's testimonial demeanor was as credible as that of Clemente and Jose Fernandez, and the evidence fails to demand a finding that she was acting as an agent of the Respondent so as to bind the Respondent with the import of such statements, had they been — in fact — made. Mrs. Donate's purported hearsay threats and statements, as described by the Fernandezes, are not so critical to the issues in this proceeding as to require resolution of the testimonial conflict regarding them, particularly inasmuch as her agency *vis-a-vis* the Respondent is not clearly evidenced in the record.

Donate returned to the crew, work had already been in progress approximately one-half hour, but Donate was not docked in pay for that absence.

Another feature involving the Rios crew relates to a party held on December 16 at a restaurant known as La Coyote, where many of the crew gathered for eating and drinking. Also in attendance were Jose Rios, Ray Hernandez, the general foreman, Jim House, Toribio Cruz, and his attorney, Thomas Slovack. As both Cruz and Eva Donate acknowledged, the occasion was used to solicit signatures for a decertification petition and, according to Cruz, some 20 to 24 signatures were gathered. Mr. Slovack also used the opportunity to get various crew members to sign declarations to be used in seeking reversal of the recent dismissal of a prior decertification petition. The evidence does not indicate, however, that any of the supervisory personnel present directly participated in the gathering of signatures on either the petition or the declarations.

The last, and most significant, feature of activity involving the Rios crew occurred around December 21. The Rios crew was laid off after the week of December 16 and remained on layoff until December 26, when they returned *en masse*. During the hiatus in work the third and instant decertification petition was filed, on December 19, but because it had an insufficient number of signatures, the Petitioners were given one or two more days to gather the necessary signatures.

It was estimated to be December 21, when Petra Ortiz, a member of the Rios crew, received a telephone call from Alehandrina Gutierrez, another crew member, who requested that Ortiz go to the Kennedy Market in the town of Heber so she could sign a decertification petition.[34] Ortiz went as re-

[34] Although not accepted in evidence at the time for the truth of this hearsay assertion, Ms. Ortiz recalled that Gutierrez told her that Jose Rios wanted her to come to the Kennedy Market to sign the petition. This hearsay assertion is noted here, because Gutierrez later denied telling Ortiz that Rios had requested her to come to the market. In addition to this contradiction in testimony, several other reasons, as noted soon, indicate that Gutierrez's testimony cannot be accepted as credible.

quested and located Jose Rios sitting in his car in front of the market, along with Pedro Martinez, another crew member. When Ortiz asked Rios what he wanted her to do, Rios, saying nothing, nodded toward Martinez, who promptly produced an unsigned decertification petition. Ortiz informed him that she had already signed the petition and left, observing another crew member, Ramon Torres, also present in the market area.

Ms. Gutierrez admitted telephoning Ortiz and a few other employees, such as Adelina Moreno, and requesting them to meet at the Kennedy Market in order to sign the petition. Ms. Gutierrez claimed she made her telephone calls at the request of Pedro Martinez, who came on foot to her home behind the market. Mr. Martinez had never been to her house before or made any similar request of her in the past. But, Ms. Gutierrez had been Jose Rios's customary contact person with crew members who lived in Heber, Brawley, El Centro, and Imperial, when he wished to deliver telephone messages for them to return to work from layoff status or when he wished to leave paychecks for employees who had not received them at work.

Indeed, Jose Rios also visited Gutierrez's house the same day as Martinez. According to Rios and Gutierrez both, Rios said nothing that day about the decertification petition, but merely requested Gutierrez to telephone employees and let them know that work would resume the next day. Rios also claimed that he coincidentally met Pedro Martinez and Ramon Torres at the market and then gave them a ride from Heber to Calexico, as Martinez had no automobile.

Neither the testimony of Gutierrez nor Rios can be accepted as credible. When Gutierrez was first approached by a Board agent concerning the Kennedy Market incident she denied having any knowledge whatsoever concerning it and admitted being fearful of her discharge if she were compelled to testify. When she testified, in behalf of the Respondent, Gutierrez materially changed her testimony regarding Rios's visit to her home: first she claimed that he came to her house

before Martinez did; then, after she was questioned as to why she had not mentioned the work-recall to the workers she later telephoned about coming to the Kennedy Market, she claimed that Rios had come to her home after Martinez. Nor is it true that the crew was to return to work the next day, for their return did not take place for some five more days. And Rios's assertion that he accidentally encountered Martinez and Ramos at the market and drove them to Calexico cannot be accepted in view of the rebuttal testimony of Sylvia Ponce, who described a day in December when Martinez and Ramos came to her house in Mexicali driven by Jose Rios, who waited outside in his car, and solicited her to sign the decertification petition. It is more than fair to conclude that this incident involving Ponce took place on the same day as the day on which Rios assisted Martinez in trying to gather the signatures of Ortiz and Moreno (and her mother) at the Kennedy Market, signatures apparently needed in order to qualify the last-filed decertification petition for an election.[35]

5. ***Pedro Palacio's Crew.***

Pedro Palacio, an admitted supervisor, was foreman of a weeding and thinning crew that performed work similar to that of the Rios crew. Cruz and Castellanos visited Palacio's crew on two occasions.

The first time the two Petitioners came they spoke only to Palacio. According to Palacio, they asked when they could come and speak with the crew about voting against the Union. Palacio told them to return at lunch time. Palacio then informed members of his crew that two men had come to get

[35] In a later section of this decision, the testimony of Jose Armando Fernandez, regarding a threat made by Jose Rios over employee support for the decertification drive, will be discussed. This threat, and its implication, is more related to the discharge or layoff of workers in the Rios crew than it is to the kind of incidents discussed in this portion of the decision, although it is not without bearing on the matters discussed in the immediate pages.

their signatures and would return at lunch, according to Guadalupe Montes, a crew member.[36]

The second visit of Cruz and Castellanos occurred about a week later, in late November, along with Eva Donate. They arrived before the crew began work; some of the crew were outside of the crew bus and some eight to ten were still sitting in the bus. According to Palacio, he went to the bus at Cruz's request and told those seated within that someone was there to speak with them and that they should gather outside. According to Ms. Montes, Palacio told those in the bus to gather together "because the people who came to talk to you are here about some signatures."

Eva Donate then attempted to get the Palacio crew members to sign a decertification petition. But, the crew, in toto, refused to sign the petition. While Eva Donate spoke to the crew Mr. Palacio remained nearby and overheard the conversation, as he admitted. None of the Petitioners returned again to the Palacio crew, as no one in the crew had supported the anti-Union effort.

6. *Thomas Romero's Crew.*

Toribio Cruz and Manuel Castellanos solicited support also among the crew of Thomas Romero. The testimony concerning the nature and extent of their solicitation effort is again in conflict.

Thomas Romero claimed that the two Petitioners came only one time to his crew. Romero claimed that when Cruz and Castellanos arrived the crew was approaching the edge of the field picking melons, and that he (Romero) declared a break. He recalled that the Petitioners remained with the crew for some 12 to 13 minutes, longer than the normal 10-minute

[36] Mr. Cruz claimed he came to the Palacio crew only once and denied speaking to Palacio. Mr. Palacio, however, contradicted that testimony. Palacio did not contradict Montes's testimony that he informed his crew members that Cruz would come to them during lunch to gather their signatures.

break, although Romero claimed he sometimes extended the break five to ten minutes when the crew had worked well. Romero described how three different employees, including Ramon Berumen, read aloud to the others from the decertification petition as Romero remained standing against a trailer some 30 to 40 feet away. Initially Romero said he more or less instructed Berumen or the others to read the petition, but later he denied telling them to read it. Romero remembered that the employees returned to work immediately upon Cruz's departure.[37]

Ramon Berumen, a member of Romero's crew, recalled that Cruz visited the crew twice. On both occasions, about a week apart from one another, Cruz stood by the edge of the field and spoke to employees as they came out of their respective work rows to turn around and re-enter the field. On the first visit, according to Berumen, Cruz was there about 10 or 15 minutes, and Foreman Romero remained only a few meters away from him. As Berumen turned at the field's edge and Cruz solicited his signature on the petition, Romero said aloud that Berumen could sign. Other employees were also then nearby. Berumen believed that some six or seven employees signed the petition that day.

The second visit was similar, according to Berumen. On this occasion, however, Romero stood some 30 feet away and did not tell the workers they could sign the petition. Berumen denied that either visit occurred during a declared break time and claimed that official breaks on both days occurred after Cruz and Castellanos had departed.

In some respect the difference in testimony between Romero and Berumen is not that great. If one focuses on one portion of Romero's testimony, his recollection reflects that

[37] Cruz, whose testimony I generally do not credit, claimed also to have visited Romero's crew only once. But Cruz claimed that his visit occurred when the crew was changing fields and awaiting a new trailer. Cruz's version of his visit is contradicted by not only Mr. Berumen but by Mr. Romero as well.

Cruz solicited the crew for longer than a normal break, that Romero purposely called a break (or permitted one to take place) because Cruz had come, and affirmatively advised the workers to read the peitition (while Berumen recalled he advised workers they could sign it). In these respects the import of Romero's testimony is not unlike that of Berumen's.

On balance, however, I am more convinced that Berumen's recollection is the more accurate one. In the content of his testimony and in his manner of testifying no effort was apparent that Mr. Berumen exaggerated or had a partisan cast to construe events loosely so as to falsely accuse the Respondent of misconduct. On the other hand, Romero's testimony was both confusing and in self-conflict over such significant matters as to whether he instructed members of his crew to read aloud the petition to the others and whether he understood the reason for Cruz's visit. Romero at one point acknowledged he more or less understood that Cruz was campaigning against the UFW, but at other points insisted he paid no attention to the visit and that its purpose was none of his concern. On the whole, then, I believe Berumen's account that Cruz visited the crew on two occasions and solicited support for the decertification effort during work time; and, even if he did not, it seems evident, at least on one of Cruz's visits, that Romero directed his crew to take a work-break in order for them to speak with Cruz and discuss the decertification petition.

7. Piece-Rate Melon Crews.

About November 30 two piece-rate crews were hand-harvesting melons in the same field; the foremen of the crews were Pedro Padilla and Ray Velez, Sr. Hilario Corall, a member of the Velez crew, observed Mr. Cruz come into the field while work was in progress. He remained for about 15 minutes, talking with members of the Padilla crew and gathering their signatures while they continued working.

Later that morning, as members of the two crews were on the crew bus waiting to leave the field, Mr. Cruz joined them on

the bus.[38] Mr. Cruz said he was there with a petition for a new election. According to Mr. Corall, he asked Cruz who had sent him and Cruz at first answered that he was there on behalf of the state and then said that Ben (Abatti) had sent him. Corall asked Cruz what benefits they were talking about on behalf of the Company, and Cruz told him "they were offering better benefits, like a medical plan, better than the plan that we had."

Angel Carillo, another member of the Velez crew, similarily recalled the discussion, although somewhat differently than that recalled by Corall. Carillo recalled that Cruz said he wanted the workers to sign for a new election so that they could get better benefits and a better medical insurance plan, but he failed to answer Carillo's inquiry as to who had sent him to gather signatures. According to Carillo, Cruz responded to a question from Hilario Corall by saying that if the Union loses it would make no difference, for Ben had said he would keep the same benefits and working conditions and that the only difference would be that the workers would get better medical insurance.[39]

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[38] No evidence was presented that Padilla or Velez, Sr., either knew of or assisted in Cruz's talking to workers on the bus. Because the evidence indicated no active involvement of the two foremen in the after-work solicitation by Cruz, Respondent was assured during the hearing that Cruz's campaigning while on the bus could not be construed as connected with unlawful Employer assistance for the Petitioners. Nonetheless, Cruz's comments while on the bus remain in the record since they relate to the charge that Cruz, while acting as an agent for the Respondent, made unlawful promises to employees in order to have them sign the decertification petition.

[39] Hilario Corall was then the UFW's highest elected representative from among the Respondent's workers, serving as president of the ranch committee; Angel Carillo also served on the ranch committee and as a substitute for Corall. Despite their affiliation with the UFW, the testimony given by Corall and Carillo seemed credible as to the events they described. Ray Velez, Jr., son of Mr. Velez the foreman, and who was called as a witness by the Respondent, did not contradict their testimony concerning what Cruz had said on the bus. Roberto Tafoya, who had also been present on the bus and was called as a witness by the Respondent, was not questioned about and, thus, also did not contradict their testimony regarding Cruz's statements.

Mr. Cruz returned on a later day to gather signatures again, telling the workers that the previous signatures had been voided. According to Carillo, Cruz again came on the bus and similar to his first visit said pretty much the same thing. Carillo also recalled seeing Cruz earlier during that day riding on one of the trucks which picked up harvested melons; he rode on the truck for some two or two and one-half hours along with Pedro Padilla, the foreman. But, Carillo, who was not in Padilla's crew, did not testify to hearing anything that Cruz had said to workers while riding on the truck.[40]

C. Changes In the Employees' Working Conditions After the Decertification Election

1. *Medical Insurance Coverage.*

As earlier noted, according to the credible testimony of several employee witnesses, the decertification drive centered largely on the issue of improving the employees' medical insurance coverage.[41] Immediately following the decertification election, which tentatively indicated that decertification had succeeded, the Respondent put into effect its own new and improved medical insurance program.

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[40] Counsel for the Respondent, in its post-hearing brief, requested that the hearing be reopened so that Respondent could present evidence with respect to Cruz's activity among Padilla's crew, which evidence Respondent's counsel failed to present previously. Respondent claims that such evidence was not presented through an inadvertent error. Respondent's request for reopening is denied. It was made clear before Respondent commenced its defense that Cruz's activity among the Padilla crew was considered as falling within the complaint and was an issue raised by the General Counsel's witnesses. Thereafter, the Respondent had the opportunity to respond to the evidence but did not.

[41] At one point in his testimony, Toribio Cruz acknowledged that he told employees that he was seeking decertification to see if the employees could get a better medical insurance program. Castellanos also acknowledged telling employees that the Petitioners wanted to see if they could get better medical insurance coverage. As indicative of his testimony throughout, however, Mr. Cruz also took the position that he never mentioned improved medical insurance coverage of the employees he solicited: "No, I never said nothing about the medical plan, of having another medical plan, no. I never mentioned it."

According to Susan Estrella, on December 28, the day after the election, Agnes Poloni called her at the Beach Street Health Services in San Diego, where Estrella was employed. Beach Street Health Services ("Beach Street") had provided medical insurance for Respondent's field workers prior to the UFW contract. After mentioning the election, Poloni told Estrella that the Respondent wanted a medical insurance program for field workers effective by January 1, a plan which increased the employees' benefits. Sam Hartman, a vice president of Beach Street who participated in the telephone call, corroborated Estrella's testimony, although he recalled the day on which Poloni called as being December 29.[42]

According to Hartman, he had been forewarned that Respondent might seek to have Beach Street administer a new medical insurance program for employees. When initially approached concerning the matter by a Board agent in January or February, 1979, Hartman told that agent that he had talked with Mr. Ed Kendal, the Respondent's primary insurance agent, in late November or early December, 1978, and learned from Kendal that Respondent was thinking about reinstating a medical insurance program and that an election petition was in process. While testifying at the hearing, Hartman claimed that based on a subsequent conversation with Kendal, Hartman now believed that his earlier conversation with Kendal had not occurred on the dates originally recalled by Hartman, but rather that Kendal had informed him of Respondent's intentions sometime in mid-December.

In any event, on December 29 Estrella went to the Respondent's office. She spoke with Ben Abatti and Agnes Poloni about a medical insurance plan to cover employees effective January 1 and that the plan should contain improvements from the last one Respondent had. Several days later Estrella presented a proposal to the Respondent concerning an

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[42] Mrs. Poloni denied talking to either Hartman or Estrella on the telephone. Mrs. Poloni's testimony in this respect cannot be credited, as contrasted to the far more trustworthy recollections of Hartman and Estrella.

improved medical plan, estimated at that time to cost the Respondent $5,000.00 more per month than the plan last carried with Beach Street in 1977-78. The proposal was accepted and provided for increased coverage and a new dental plan. Estrella recalled that in the first meeting on December 29 Mr. Abatti had said that employees had suggested to him certain improvements for the medical insurance coverage, such as increased maternity benefits and office visit benefits.[43]

The Beach Street plan as devised by Ms. Estrella was then agreed to on or about January 3, but made retroactively effective back to January 1, even though the UFW's existing medical coverage for Respondent's employees would continue in effect at least through January. Thus, during January, if not for longer, Respondent's employees received double medical insurance coverage. (It was the Beach Street plan that Cruz and Castellanos were covered by in January even though neither of them had sufficiently qualifying work hours to be entitled to such coverage.)[44]

In placing into effect its own medical insurance program for the field workers the Respondent did not bargain about the matter with the UFW, although the Respondent's counsel had raised the subject of medical insurance with the UFW. During December, as industry negotiations proceeded between various lettuce growers and the UFW, Respondent's counsel, Thomas

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[43] It was well known to both Ben Abatti and Agnes Poloni that numerous employees were unhappy with the UFW's medical insurance program. Both recalled hearing employees complain about the UFW plan almost from the time that the UFW contract was signed, some six months before the decertification election. But Abatti denied talking to any employees about having a new medical insurance plan.

[44] By the time of the hearing Respondent's costs for the Beach Street plan had diminished substantially from those which were predicted at the outset of the plan. However, the reason why the costs decreased was because Beach Street later began implementing a special "medical provider" service, which provided even greater medical insurance coverage for employees than originally commissioned in January, 1979, but at lower costs. Irrespective of the cost to Respondent, both the employees and the Respondent had to view the Beach Street plan as an improvement over the previous Beach Street plan.

Nassif, who was a spokesperson for the lettuce growers, asked David Burciaga, the UFW's spokesperson in the lettuce negotiations, whether the UFW intended to continue covering Respondent's field workers under the UFW's medical insurance plan, but (according to Nassif) the UFW never replied to his inquiries. Mr. Ben Abatti, however, testified that he never authorized his counsel to bargain with the UFW about the workers' medical insurance coverage. Indeed, the Respondent did not participate and was not represented at the lettuce industry negotiations, and David Burciaga apparently was not the UFW's negotiator with respect to the Respondent's employees. And, when the UFW, through Delores Huerta, requested the Respondent to bargain over a new contract, on December 29, the Respondent formally refused to enter into negotiations with the UFW.[45]

2. *Increased Wages.*

Some three months after the decertification election the Respondent paid to its piece-rate lettuce harvesters, about 105 employees, an aggregate premium of 10%, in addition to their

[45] The Respondent's refusal to bargain is evidenced in a letter dated January 12, 1979, written by Respondent's counsel, wherein the UFW was informed:

> The Company has a good faith belief that the Union no longer represents the majority of its work force and therefore the company no longer has a duty to bargain with the United Farm Workers.**** (S)ince the (election) results have indicated that the Union no longer represents the majority of the Companys' (sic) agricultural employees and since the majority of the persons challenged to vote are not eligible voters in the election, the Company does not intend to negotiate.

past piece-rate wages. The facts surrounding this extra wage payment, however, are confusing and inconclusive.[46]

A composite of testimony indicates the following as the most likely explanation behind the 10% wage increase for the lettuce employees. Sometime around late December, or even in January, 1979, the lettuce harvesters discussed among themselves their desire for either a raise in wages or the need of a new contract to replace the expired UFW contract. Led apparently by Roberto Tofoya, the lettuce harvesters began demanding from Abatti an increase of 20% in their existing piece rates, based on the so-called "Hansen contract," a contract that existed between another grower, Hansen Farms, and its nonorganized field workers.

Through some three meetings with Ben Abatti, wherein the Hansen contract was discussed, Abatti finally agreed to pay the employees an increased wage, giving them first a 10% increase and promising them the second 10% increase after the dispute regarding the UFW's decertification was settled by the government. The first increase was given to employees in a lump sum payment in late March, 1979, when the lettuce harvest was over. Although some confusion surrounding the matter exists, it appears, as indicated by Ben Abatti, that the lettuce increase

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[46] When he originally testified at the hearing, Ben Abatti denied outright making any premium wage payment to his lettuce employees. When he testified later at the hearing, after it had been established that the 10% premium was paid to lettuce employees, Abatti admitted he had paid them the extra 10%, and he claimed that his earlier denials arose because he was questioned with respect to a "bonus" and that he did not consider the 10% payment as a bonus.

Mr. Abatti's explanation for his earlier testimony (i.e., his denial) regarding the 10% wage payment cannot be accepted. His earlier testimony was addressed to whether he gave the lettuce employees a bonus or pay raise and, although he denied giving them either, he contemporaneously admitted they asked him for one and that he told them he would not give them a raise until the hearing was over, or the decertification matter was resolved. Thus, it is clear that Abatti understood which "pay raise" or "premium" or "bonus" the General Counsel was interrogating him about. Yet he flagrantly denied granting one when he initially testified.

was in addition to all other wages and benefits that the lettuce workers continued to receive under the expired UFW contract. According to Roberto Tofoya, Abatti acceded to the demand for the lettuce wage increase when he was finally threatened with a strike by the employees.[47]

The General Counsel attempts to correlate the March, 1979, lettuce premium with the earlier decertification campaign, but the facts leave this correlation unconvincing. Nothing substantial reflects that the lettuce harvesters were promised any wage increase or premium in connection with the decertification election. The wage increase occurred approximately three months after the election. And, a composite of the testimony indicates that the wage increase probably resulted from the lettuce workers' demands for increased wages during the height of the lettuce harvest and not as a result of Respondent's effort to satisfy a promise to or reward the lettuce workers in connection with the decertification election. The

[47] It is difficult, if not impossible, to rely heavily on Mr. Tofoya's testimony, as it was often confusing and nonresponsive. Indeed, as to Tofoya's claim that Abatti agreed to pay a 10% increase because of a threatened strike, Abatti, himself, never made that claim and could offer no substantial reason why he agreed to pay the costly increase to some 105 workers.

On the other hand, the testimony of Juan Alvarez, another lettuce harvester, appeared credible. Alvarez testified in a slow, even manner, and it did not appear that his testimony was fabricated or exaggerated. I have largely based my conclusions upon his testimony. In this regard it should be noted that Alvarez's testimony regarding the wage increase was not so at odds with the testimony of Angel Carillo, who I have generally credited as a witness, so as to place one or the other's testimony in serious question. Most of Alvarez's testimony portrays events that can be squared with Carillo's recollection, and it would not be surprising if the workers who were led by Mr. Tofoya, among them being Mr. Alvarez, discussed and planned their strategy regarding the Hansen contract demands without the knowledge of Mr. Carillo, who — after all — had been an important UFW representative among the harvesters and an unlikely person to have been consulted when the workers decided to try to replace the UFW's contract with the Hansen contract.

inference connecting the decertification campaign and election to the subsequent lettuce wage increase is factually inadequate.[48]

III

DISCRIMINATORY CONDUCT ALLEGEDLY ENGAGED IN BY THE RESPONDENT.

A. The Jose Rios Crew.

1. *Introduction.*

As earlier noted, Jose Rios distinguished himself among Respondent's crew foremen by the active help he provided to Pedro Martinez and Ramon Torres in soliciting signatures for the last decertification petition in order that it qualify for an election. This active help occurred around December 21, while Rios's crew was laid off.

Two other features of Jose Rios's conduct are noted in the record. The first feature was described by the testimony of Jose Armando Fernandez, who along with his father, Clemente Fernandez, was laid off from Rios's crew on December 12. Jose Armando recalled that two days after he signed the first decertification petition circulated by Eva Donate, on November 28, he spoke with Jose Rios in a field where the crew was working. Ben Abatti had just finished conferring with Rios in the field, and after Abatti had left Jose Armando asked the foreman what the boss thought of the crew's work. According to Jose Armando's recollection, Rios informed him that the boss had come to say that everyone in the crew should sign the

[48] Another "payment" to the lettuce harvesters, however, was much more proximate to the decertification election. At the end of 1978, days after the decertification election, the Respondent gave to all its lettuce workers a "fifth" of Seagram's V.O. whiskey. Although Ben Abatti loosely asserted that the Company had occasionally made such gifts in the past, I credit Angel Carillo, a Company employee for some 10 years, who denied that any such gifts had ever been given before.

decertification petition, that especially that crew should sign the petition so that they could continue working. Rios said that "anyone that didn't sign it was going to be laid off."

Although the Respondent challenges the credibility of Jose Armando's testimony, I credit his recollection concerning the lay-off threat that Jose Rios passed to him on November 30. Jose Armando's demeanor was credible; he testified in an unexaggerated fashion and appeared convincing in his sincerity. The fact that he had not prepared an affidavit or declaration prior to the hearing does not destroy the veracity or accuracy of his recollection, as the Respondent suggests. No requirement exists that a witness's testimony be documented by a contemporaneous affidavit; indeed, the absence of one may just as much reflect that Jose Armando did not wish to become personally involved in the litigation against the Respondent than it reflects a recent attempt by him to fabricate or distort his recollection. And, although Jose Armando cannot be characterized entirely as a disinterested witness, inasmuch as his father and mother are herein actively challenging their layoffs, it should be noted that Jose Armando (as discussed later) openly admitted facts that might foreclose him from any back pay claim in respect to his own layoff or discharge. In addition, it should be noted that much of his testimony related to Eva Donate, who had been his friend and work partner when he was employed by the Respondent, and he did not appear eager to malign her conduct. Finally, Respondent notes that on cross-examination Jose Armando failed to recall his prior testimony regarding Jose Rios's threat; but, that failure appeared to result from confusion over the generalized questions he was being asked and did not strike me as an inconsistent failure of recollection that it is accused of being. Indeed, to clear up the testimonial confusion (over such general questions as to how many different conversations Jose Armando had regarding the decertification drive) he was asked specifically during his redirect testimony whether Jose Rios said anything concerning the decertification drive and he reconfirmed Rios's threat that he had earlier described during his direct testimony.

Nor is it as unlikely as Respondent suggests that Rios would have referred to Ben Abatti and the layoff threat in a conversation with Jose Armando, so as to make Jose Armando's testimony questionable. One must remember that Jose Rios also intruded openly on December 21 into the decertification campaign by chauffeuring two sponsors of the decertification petition. One will also see, in the coming paragraphs, that Jose Rios became personally violent with a prior crew member who, as the Board found, Rios discharged unlawfully two years before. Furthermore, it is fair to conclude that Rios viewed Jose Armando as being distinct and apart from his father, Clemente, the crew's Union representative, since Rios continued to befriend Jose Armando after the December 12 "layoff" and even offered to help gain other employment for him. Based on these foregoing considerations, and after having observed Jose Rios while testifying, I do not believe it unlikely that Rios would have off-handedly remarked to Jose Armando, on or about November 30, that Ben Abatti wanted everyone in the crew to sign the decertification petition and that those who did not would be laid off. In this connection it might be noted that Rios's comment to Jose Armando occurred a day or two after the members of the Pedro Palacio crew had — *en masse* — refused to sign the decertification petition, thus making the Rios crew's support for the petition more crucial to its success.[49]

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[49] As earlier noted, Jose Armando (as did his father) also described Eva Donate as warning him that those who did not sign the decertification petition would be laid off. I have determined not to resolve the credibility conflict between their testimony and Eva Donate's denials. But, in passing it should be noted that when two other Rios crew members, Adelina Moreno and Maricela Neblas (Alfara), were asked whether they had heard Donate issue any threatening remarks regarding layoffs, both of them visibly faltered in their denials. Further, Ms. Moreno's testimony vaguely suggests that she was aware of a layoff threat, as suggested by her unpersuasive claim that Donate made no verbal effort to encourage Moreno to sign a decertification petition when the matter first arose, and as suggested by Moreno's response to Donate when Donate gave her the petition to sign — to wit, that "I told Eva that what I needed was to work and not be involved in other things. I need the money for my expenses."

The second feature concerning Jose Rios' behavior that has a bearing on his involvement with the layoffs in question, as well as with his credibility, involves his attack on Jesus Salano, a prior crew member. As earlier noted, on May 9, 1979, while the instant hearing was in progress, the Board issued its decision involving charges filed against the Respondent in early 1976 and held, *inter alia,* that Jose Rios had unlawfully discharged Jesus Salano.

The day after the Board issued its decision involving Salano, he saw Rios by Rios's home, where Salano had just driven a friend. According to Salano, Rios yelled at him to come to Rios's house, after which Rios went in his home and came outside with a pistol. Rios told Salano that "you have completedly bored me," after which he threatened to kill Salano.[50] As Salano moved away from him, Rios shot him in the leg and then hit Salano on the head with the pistol. Rios also pointed the gun at Salano's head and threatened to kill him.

Although Rios admitted shooting Salano and hitting him three times with the pistol, he claimed that Salano provoked the encounter and that it had nothing to do with the Board's recent unfair labor practice finding against him. Neither of Rios's claims is credible. For one thing, Rios's version of the encounter is inconsistent and incredible. At first he claimed that Salano was outside his home with a knife, yelling at Rios. But, Rios later claimed that the first time he saw Salano's knife was after he came outside his house with his pistol. Then Rios claimed he shot Salano when Salano attempted to pick up a bottle (apparently to strike Rios), but it is unclear why Salano would have reached for a bottle when, as Rios claimed, he had a large knife in his hand. Rios also contradicted himself when he claimed that he knew Salano always carried with him a gun,

[50] Although the English translation of Rios's comment to Salano sounds somewhat odd, it appears that the meaning of his comments were essentially that Rios was fed up with Salano or tired of the trouble Salano had caused.

first claiming to have always seen him with one and next claiming to have only heard that he shot a gun at night in the neighborhood.

It seems more probable that the Rios-Salano encounter on May 10, 1979, related to the Board's recent holding against Rios and the Respondent. The two men had seen one another before, after Salano's discharge, and no trouble ensued. It also seems unlikely that Salano would have gone out of his way to provoke Rios at that juncture. It is far more probable that Rios was the one who was now provoked and sought to take out his retribution against Salano.[51]

2. *The Layoffs.*

On December 12 the following persons were laid off from Jose Rios's crew: Clemente Fernandez, his wife, Gregorio, his son, Jose Armando, Francisco Salas, and Maria de La Luz Torres. (Francisco Salas and Maria Torres were not members of Clemente Fernandez's family, but they were the only others who rode to work with Mr. Fernandez.) Clemente Fernandez was the designated UFW representative in the Rios crew, and the Company was aware of that fact since October. Clemente and Gregorio Fernandez were the only two who had not signed the first decertification petition solicited by Eva Donate among the Rios crew, and they plus their son, Jose Armando, were the

[51] Earlier I noted that Jose Rios's testimony could not be credited in respect to the incident involving his assistance to Pedro Martinez and Roman Torres at the Kennedy Market (*supra*, pp. 20-21). Now I might note that Rios's testimony was generally unconvincing in view of his testimonial demeanor. His efforts to deny any unlawful or questionable conduct on his part were characterized by notable jerkiness and faltering, so much so and so consistently so that his denials betrayed the opposite impression to this neutral observer. Having observed Rios as a witness, and having listened to his self-conflicting answers, I have determined that his testimony cannot be generally accepted as credible.

only three among the crew who did not sign any of the later decertification petitions.[52]

The five crew members were laid off without prior notice, at the conclusion of the work day on December 12. Rios informed Clemente that he and his car of workers were being laid off because there was very little work left and because they were the most junior workers in the crew. According to Clemente Fernandez, one of the two UFW representatives who were present among the crew that afternoon asked Rios whether there were not employees more junior than those who were being laid off, and Rios replied "he did not know anything, that it was an order from the office." At the time he issued his layoff notices, Jose Rios had not seen the seniority list for his crew.

According to Rios, he issued the layoffs pursuant to the direction of Ray Hernandez, the Company's general foreman. Rios claimed he was given the instruction without prior discussion with Hernandez and was not consulted regarding the size of the layoff. Rios recalled at one point in his testimony that Hernandez instructed him to lay off five or six employees so the crew would not be over 25 employees, and at another point he recalled that Hernandez instructed him to lay off the "newer ones" so the crew would not be over 25 or 26 employees.[53]

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[52] In pursuing his role as the UFW crew representative, Clemente Fernandez had had several discussions with Jose Rios in November and December regarding what Fernandez believed to be employee problems, such as the location of water containers, appropriate bathroom facilities for the crew, and the use of crew helpers. According to Fernandez, Rios did not respond amicably in these discussions.

[53] During the week when the "Fernandez group" was laid off, the pay week of December 16, the Rios payroll showed 29 active employees in the crew (not including Ramon Torres, whose placement in the Rios crew will be discussed later, but who was not a regular member of the crew at that time). During the prior week a similar number of employees worked in the crew (not including Ricardo Padilla, whose name only shows up as having worked December 8 and 9 in the crew). Thus, the layoff on December 12 did not bring the crew size down to 25 or 26, as Rios claimed was Hernandez's intention, but down to 24 employees; and the additional layoff the following day brought the total down to 23 employees, which is reflected by the payroll data for the next two work weeks of December 30 and January 6.

Fernando Franco, a worker in Angel Avina's crew and who also worked in the rapini harvest, portrayed a far different version of Ray Hernandez's layoff instruction to Rios. Franco recalled that on December 6, the first day of the rapini harvest, he encountered Hernandez and Rios talking by the side of a field, as Franco was searching for the rapini field. He parked his car and walked across the road, where Hernandez sat in his pickup truck talking to Rios through the open door on the passenger side. As Franco approached to ask where the rapini field was he heard Hernandez tell Rios: "fire him, fire him, fire him. I don't want anybody from the Union — any representative from the Union — talking to the people." When Rios agreed to follow the instruction if Hernandez would "respond" for him, Hernandez told Rios he would respond for him. At that juncture Rios saw Franco approaching and asked what he wanted, and after Franco explained he was looking for the rapini field Hernandez agreed to show him where it was.

The Respondent attacks Franco's strategic testimony on several grounds, none of which prevails. For one thing, Franco's declaration is not significantly at odds with his testimony: the only possible discrepancy between the two is that his declaration fails to mention that Hernandez told Rios he did not want someone from the Union talking to the workers and, instead, reflects that Hernandez told Rios to "fire him, fire him to hell. I don't want a single Union representative." For another thing, from Franco's description of the encounter it does not seem unlikely that he could have approached to within hearing distance of Rios and Hernandez without their noticing him, as Rios had his back toward Franco while leaning in the open pickup door, blocking Hernandez's view toward the approaching Franco.

In addition, Franco's description of how he came to provide information concerning the Rios-Hernandez conversation seems believable. Franco went to the UFW's office around December 13 with his first paycheck from the rapini harvest, as

the UFW was attempting to learn whose rapini crop it was; he then informed Anita Morgan from the UFW of the Rios-Hernandez conversation. Morgan then expressed no concern over any discharges and told Franco his observation was not significant. On December 29, however, UFW agents came looking for Franco to discuss what he had overheard, as they now expressed concern because some discharges had taken place. Franco then prepared his declaration the following day.

Finally, one cannot help but be impressed with Mr. Franco's testimony, from the standpoint of both his observable demeanor and the fact that he, as an employee of nine years with Respondent and one who had no personal association with the Fernandez group or its work crew, had nothing to gain from providing such damaging testimony against his long-time employer. Franco's testimony is worthy of great weight, in keeping with the risk he has exposed himself to by way of his long-time employment.[54]

Apparently because concern existed over whether the Fernandez group was the proper group of workers to lay off based on seniority, Jose Rios checked with Agnes Poloni in the office about his crew's seniority. She, in turn, reviewed certain earnings records of the Company to verify the seniority of three other workers in the Rios crew who were designated on the Company-prepared senority list as having the same seniority month as Clemente Fernandez and the rest of his group, namely, September, 1977. After her review, Poloni changed the seniority dates of the three other employees, Alejandrina

[54] Both Hernandez and Rios acknowledged that Franco encountered them one day at the edge of a field, as he was looking for the rapini harvest. Both, however, denied talking about discharging anyone from Rios's crew. In describing Franco's encounter with them, Hernandez and Rios claimed that Franco yelled at them from between 45 and 100 feet away, asking where the rapini field was. It seems doubtful to me that Franco, a soft-spoken person while appearing as a witness, would be likely to have yelled at a crew foreman and the general foreman from that distance to ask about the rapini field.

Gutierrez, Vincenta Orta, and Eva Donate, from September to August, 1977, thus making these three more senior.[55]

In reviewing the Rios crew's seniority list, Poloni discovered that Maria Valdez, another worker, was a newer employee that anyone in the Fernandez group, she being hired sometime during the week of October 15, 1977. Poloni informed Rios that Valdez was junior to the Fernandez group and should be laid off. Without rehiring one of the Fernandez group, Rios laid off Valdez the following day, December 13, thus bringing the total to six layoffs. (Had one of the Fernandez group been recalled to work then, it appears that it might have been Clemente Fernandez, as his testimony stands unrebutted that he began working before his wife and son, and no evidence exists as to the precise beginning dates for Francisco Salas and Maria Torres.) Despite Valdez's layoff on December 13, she began working again for the Respondent the very next day in another crew; no one from the Fernandez group returned to work for months.

3. ***Seniority and the Economic Justification for the Six Layoffs.***

A review of the record evidence indicates that the Fernandez group, or at least some members of that group, were not the

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[55] Based on certain "Company Information and Earnings Records" introduced into evidence, the three employees mentioned above appear to have had paychecks issued to them during August, 1977, whereas the Fernandez group's earliest paychecks were issued the week of September 3, 1977. More will be said about seniority in the Rios crew in the following section, but it seems fair to conclude that Gutierrez, Orta, and Donate were employed in the Rios crew earlier than the Fernandez group, even though testimony establishes that the Fernandez group began working in late August rather than in September, 1977 (for which work they were first paid on September 3, 1977).

most junior workers in the Rios crew.[56] It has already been noted that the Fernandez group was laid off before the Respondent laid off Maria Valdez, a less senior worker. At least three other Rios crew members likewise appear to have been more junior to the Fernandez group, although they continued to work. For one there is Eva Donate, who pursuant to the clear terms of the UFW contract would have become more junior to the Fernandez group by virtue of her having worked outside of the bargaining unit.[57] The other two junior workers were Adelina Morena and Armida Vega. Ironically, they were laid off in December of 1977 by Rios because of their lack of seniority, while the Fernandez group continued to work due to its higher seniority; although Moreno and Vega had worked initially on the crew before the Fernandez group was hired, they quit their employment in 1977 and did not return to the crew until October, 1977, after the Fernandez group was hired, and Rios then considered their quitting to have severed their crew seniority when he laid them off in late 1977. Inexplicably, the original seniority of Moreno and Vega was

[56] In Section E of the Supplemental Agreement Number 2, as found in the contract then existing between the UFW and the Respondent, the following appears: "Layoffs shall be in order of classification seniority with the worker having the least classification seniority being laid off first. . . ." And, in Section B of that Supplemental Agreement the Company was directed to maintain seniority lists for many different work classifications, such as irrigator, shoveler, rapini harvest, and thin and hoe, the latter being the type of work performed by the Rios crew. On the other hand, the Rios crew was not the only one which performed thin and hoe work, even though the Company's seniority lists were based on individual work crews and not general work classifications.

[57] Article 4(B)(5) of the parties' contract provided that seniority would be lost when a "worker leaves the bargaining unit to accept a . . . position with the Company outside the bargaining unit." It was undisputed that Eva Donate performed non-bargaining unit work, namely, the Company's asparagus shed, between early February and April 1, 1978, which by contract should have resulted in her loss of seniority in the Rios crew (were it not for Ben Abatti's admitted refusal to adhere to the quoted contract provision). Eva Donate's original seniority date is also placed into question by Jose Rios, himself, who at one point in his testimony indicated his belief that Donate began in his crew after Clemente Fernandez did, which also agreed with the recollection of Clemente Fernandez.

resurrected in December of 1978, thus making them appear on the seniority list as more senior than the Fernandez group.[58]

Nor is the economic rationale for the Fernandez group's layoff clearly evidenced in the record. Rios claimed he reduced his crew's size in order to provide more work-hours to the rest of the crew and that his crew historically had layoffs in December and January. Yet, several considerations arise from the evidence to place Rios's assertions in question.

First, virtually nothing in the record supports Rios's claim that traditionally his crew had group layoffs during that time of the year. For example, the time records involving 1977-1978 indicate no significant layoffs during that period. Although some eight employees left the Rios payroll between December 3, 1977, and January 14, 1978, nine other workers appeared on his payroll between December 3, 1977, and January 28, 1978. Indeed, when he was initially asked about his crew's annual work habits, Rios indicated that a layoff only occurs around July, except for rainy periods when the entire crew does not work.[59]

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[58] Although Rios claimed he did not lay off Moreno and Vega because the Company's seniority list showed them to have greater seniority than the Fernandez group, Rios admitted he had not seen the list at the time he issued the layoffs. His admission squares with the fact that he had no apparent concern regarding the seniority of Eva Donate, Alejandrina Gutierrez, and Vincenta Orta, who were originally (and at the time of the layoffs) designated on the list as having the same seniority dates as those for the Fernandez group, and whose seniority dates were not "corrected" until after the layoffs. Thus, it is exceedingly difficult to understand how Rios selected the Fernandez group as being the most junior workers in this crew.

[59] As for any layoffs from the Rios crew in the 1976-1977 winter period, the Board dealt with several of them in *Abatti Farms, Inc.*, 5 ALRB No. 34, and found that not only were they pretextual and unlawfully motivated, but rebutted by the fact that increased work became available to the Rios crew almost immediately after the layoffs there in question. Nothing empirical was put forward by Rios to demonstrate the decrease of work in either the 1976-1977 or 1977-1978 winter periods that establishes a historical track-record of layoffs during those periods of time.

Second, Rios's crew records for the period of December 16, 1978, through January 13, 1979, indicate that at least two employees, who had no designated seniority in the crew, were employed by Rios. Thus, during the very week that the Fernandez group was laid off (indeed, the day before) Ramon Torres began working on the Rios crew; he continued working almost regularly thereafter. In addition, during two weeks of that same time period Richardo Padilla, a worker not appearing on the crew's seniority list, is named as having performed work as a Rios crew member. Also, Rios admitted that Maria Valdez was re-employed in his crew approximately one month after her December 13 layoff and Maria Torres (one of the Fernandez group) was re-employed on his crew as of mid-March. As one continues to review Rios's 1979 time records, one finds that others, such as Ricardo Padilla and Luis Pena, appear as having worked in Rios's crews even though they are not designated on the crew's seniority list.

Finally, although Rios claimed he laid off the Fernandez group to provide more work time for the rest of the crew, that does not appear to have been accomplished. Beginning only a few days after the Fernandez layoff, the rest of the crew was laid off for over a week. Exactly why it was important to lay off Clemente Fernandez and five others on December 12 and 13, when the remainder of the crew would be laid off after December 15, is demonstrated by neither logic nor the evidence.[60]

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[60] The time records of the Rios crew do indicate that after the crew returned to work, minus the six layoffs, the crew in general worked longer work days than it had during the pay week of December 16, although so did the Palacio crew which performed the same type of work. And, when one reviews the time records for both the Rios crew and the Palacio crew no correlation is apparent between the number of crew members working on any given day and the number of hours worked by them. This absence of correlation detracts from the notion that by reducing the crew size on December 12 Jose Rios was thereby able to assure the remaining crew members more substantial work time.

When Clemente Fernandez was laid off on December 12, Jose Rios informed him that he would be contacted if and when work became available. Therefore, Mr. Fernandez saw Rios twice, once in February and once in March, each time asking Rios whether he could return to work. On each of these occasions according to Fernandez's testimony, Rios told him there was no work for him since his layoff but that Rios would contact him when there was.[61]

After Clemente Fernandez was laid off, Jose Rios openly indicated his willingness to try and find other employment at the Company for Francisco Salas and Jose Armando Fernandez. When Rios saw Clemente Fernandez he indicated that Salas and Jose Armando could find work in another crew. He also spoke directly to Jose Armando and offered to seek work for him in one of the lettuce harvesting crews, but Jose Armando rejected the offer on December 16, telling Rios he would rather not work in lettuce harvesting and that he had found other employment. According to Jose Armando, Rios told him that while he (Jose Armando) might find other employment with the Company, Rios would not rehire Jose's parents because he had had problems with them. Rios, himself, acknowledged his willingness to assist Salas and Jose Armando in gaining other work with the Respondent.

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[61] Jose Rios denied telling Fernandez that he (Rios) would contact him if there were work available and also denied that he had a practice of contacting laid off workers when work became available. The credible testimony of Clemente and Jose Armando Fernandez establishes that Rios, in the past, had either come himself or sent a representative to their homes when recalling them to work from previous layoffs. This practice is also in keeping with Rios' use of Alejandrina Gutierrez to telephone those crew members who had phones, when it was time for them to return to work after a layoff. Indeed, Rios' testimony on this issue was not consistent, as he also admitted to having personally notified the Fernandezes on one past occasion when it was time to return to work after a layoff, and he also admitted that on one occasion when he saw Fernandez after the layoff he had said to Fernandez, "I would let them know as we needed them."

B. The Pedro Palacio Crew.

1. *Rosa Briseno.*

Rosa Briseno began working for the Respondent in about 1972 and was a member of Pedro Palacio's crew. She was also a member of the UFW's ranch committee, serving that committee as its recording secretary, and was the UFW's representative on the Palacio crew. The Company, of course, had been advised of Briseno's positions with the UFW. Briseno was also designated by the UFW as an alternate committee member for collective bargain negotiations.

On November 27 Briseno attended negotiations in behalf of the UFW, substituting for a regular member of the negotiating committee. (The negotiations involved the "lettuce industry," but did not include the Respondent.) She was informed by a UFW staff person that the Company was advised that she would be absent on the 27th for negotiations.[62]

On the day she attended negotiations Briseno drove some of her family members to work that morning. Either she (according to her testimony) or her family (according to the testimony of Pedro Palacio) advised Palacio she would be absent that day for Union business. Palacio, in turn, advised Jim House that Briseno was absent that day because of Union business. According to Palacio, House had instructed him previously to inform him when Rosa Briseno missed work because of the Union. On November 27 House told Palacio he should tell Briseno that she could not return to work until she first talked with House.

On the evening of November 27 Briseno talked with Palacio by telephone, and Palacio told her that she could not return to work until she conferred with Jim House. House, himself, confirmed that instruction in a subsequent telephone conversation that evening wth Briseno's brother. The following morning, Briseno looked for House at his office and in various fields, without success. That afternoon, on November 28, she returned to House's office with two staff persons from the UFW.

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[62] Although Briseno's testimony regarding the Company's notice of her absence was hearsay, Jim House of the Company confirmed that the UFW had notified his office that he would be absent. It is not clear whether that notice was originally received by his office on the afternoon of November 26 or on the next day, but House claimed he did not personally receive the notice until the 27th. House claimed that the message he received indicated that Briseno would be gone for between one and four weeks.

The staff persons went in and spoke with House, who told them that Briseno could not return to work until House reviewed the matter with the Company's attorney. He said that the Company's attorney would contact the UFW to let Briseno know about returning to work.

At 10:00 or 11:00 in the morning of the next day, November 29, Briseno was informed by the UFW that the Company would allow her to return to work. She did not return that day, however, claiming that she was unfamiliar with the location of the field she was to work in and that only an hour or two of work remained that day. She did return to work the following day, after meeting the Company's bus and following it to the field her crew was working in.

As a result of her missing work, Briseno lost three days' pay and her seven years' seniority.[63] Exactly how she came to lose her seniority over the incident is not completely clear. Briseno claimed that on the afternoon before she returned to work she was advised by a UFW staff person that while she could return to work her seniority would be lost. Although this testimony was hearsay insofar as it relates to what the someone from the Company had advised the UFW, it comports with the Respondent's position as originally stated at the hearing — namely, that "she did not return to work when the offer of reinstatement was made, and that she then was reinstated with loss of seniority the following day."

Jim House, however, claimed in his testimony that he did not consider that Briseno had lost her seniority when she returned to work. Rather, he asserted that when the UFW later filed a grievance protesting her loss of pay following November 27, that he believed UFW had failed to live up to the bargain struck regarding the reinstatement of Briseno and, thus, the Company then took the position that Briseno had quit her

[63] She lost pay for the two days of absence following the negotiations on November 27, plus one day for the Thanksgiving holiday because she had not worked the requisite days to qualify under the UFW contract for the holiday pay.

employment by leaving work without proper authorization and had lost her seniority. House confirmed his position in writing on December 20, in answer to the UFW's grievance, by claiming that Briseno had — in effect — quit her employment and, thus, lost her seniority.[64] Nonetheless, it is unclear from House's testimony just what "agreement" House believed the UFW had failed to honor, as none of the discussions he described between himself and the UFW or Briseno conditioned her return to work on her forfeiture of a pay claim. Indeed, by taking the position he did with respect to the Briseno pay grievance, House impliedly suggests that he initially viewed her absence as reason to abolish Briseno's seniority and informed the UFW originally of that viewpoint.

According to Mr. House, he had had previous problems with Union leaves for Rosa Briseno and was attempting to enforce the contract provision regarding written notice for such leaves. The evidence, however, casts some doubt on the seriousness of the problem involving Briseno. On one occasion, in June or July, she had gone to Yuma, Arizona, regarding the UFW, after notifying her foreman, but without having provided written notice to the Company. House conferred with Victor Gonzalez of the UFW over this absence, and from then on it appears that Briseno's leaves were generally taken after written notice was provided. Thus, the Company was advised in writing of her leave between August 2 and 20, her one-day leave for UFW business on August 26 to visit LaPaz, and her personal leave betwen October 7 and 26. In fact, when the UFW advised the Company of the October 7 leave, Gonzalez indicated in writing to House his understanding that "[i]n the future, leaves will be channeled through the crew foreman

[64] According to Article 11(B) of the UFW's contract with Respondent, leaves of up to three days for Union business shall be granted when, *inter alia*, " written notice shall be given by the Union to the Company at least two (2) days prior to commencement of any such leave." As for other leaves, Article 11(C)(4) provided that "[a]ll leaves in excess of three (3) days shall be in writing on approved leave-of-absence forms provided by the Company."

except in emergencies." Although House had never warned Briseno personally that she should give written notice to the Company of her absences for Union business, House claimed that when she had gone to Yuma and once when she had gone to the Union's headquarters in LaPaz she had left without prior written notice and that he had complained to Gonzalez and Saul Martinez from the UFW about the lack of written notice and had warned them that a further lack of notice would be deemed as if the employee had quit his or her employment. On the other hand, one cannot be sure from House's testimony whether his complaint regarding Briseno's visit to LaPaz involved the same visit for which written notice was provided, which, if it was, would mean she had only failed once to provide written notice, when she had gone to Yuma in June or July.[65]

2. *The Cut-Back in Work Hours.*

As previously noted, on or about November 28, Eva Donate, Manuel Castellanos, and Toribio Cruz solicited support among the crew of Pedro Palacio with regard to an early decertification petition. It is undisputed that no one from the Palacio crew signed that petition, a fact acknowledged even by

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[65] Ben Abatti claimed that the Respondent had no policy that distinguished between leaves for Union business and for personal reasons. He also asserted that crew foremen do not punish employees who only miss work for a few days.

But, Rosa Briseno described an encounter that she had with Mr. Abatti regarding the UFW, which occurred during melon-thinning season, sometime in October. Briseno had requested Palacio, the foreman, to provide water for the crew that day, and about 30 minutes later Ben Abatti confronted her in the field. He asked her what she wanted, and she explained that as the Union's representative she had asked for water, after which he said, "Who is paying you for what you are doing? Is it that bunch of carbrones or I? Who signs your checks?" He also added, "when that bunch of stupids sign and pay you, then they can order you. Meanwhile, I am the one who orders, I am the one who pays you." According to Briseno, Abatti's voice was raised during the discussion, and he concluded by telling her that he wanted nothing to do with the Union.

the foreman, Palacio. According to Cruz, the Palacio crew was not again approached regarding the decertification drive because the crew members were unanimously opposed to it.

Records for the Palacio crew tend to confirm the recollection of Rosa Briseno and Guadalupe Montes, two crew members, that the crew's work-time began to decrease around the same time as the decertification effort began. In their view, the work hours decreased because of their crew's opposition to the decertification drive and its open support for the UFW.[66]

After reviewing the Palacio and Rios crews' work records that were introduced into evidence, several observations must be made. First, the reduction that took place with respect to the Palacio crew's work-hours on Saturdays, as described in the testimony, long pre-dated the decertification drive and, thus, seems to have had nothing to do with that drive. As early as August and September, 1978, regular work was either not scheduled on Saturdays, or when it was the Palacio crew worked only five hours. The same is true for the Rios crew. The decrease in Saturday work-time namely, from eight to five hours — appears to have resulted from the Company's determination, as described by Ben Abatti, to reduce hours on Saturdays so that an "overtime premium" would not have to be paid, as required by the UFW's contract. Whatever the reason, the practice of working five or fewer hours on Saturdays appears to have begun after the UFW's contract was signed, in July.

Second, although the work-hours did decrease generally for the Palacio crew at the end of November, after the decertification effort was underway, the Rios crew experienced

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[66] The General Counsel's complaint charges that Respondent violated Sections 1153(a) and (c) of the Act by decreasing the Palacio crew's work-hours because of its support for the UFW. In large part the General Counsel contrasts the treatment extended to the Rios crew, whose members largely supported the decertification effort (at least by signing the various petitions), and that accorded to the Palacio crew. Both crews, it will be recalled, performed similar work—namely, weeding and thinning.

a similar decrease in work.[67] During October and most of November the Rios and Palacio crews generally were both working seven and eight-hour days. In early December, their work-time decreased to five, six, or seven-hour days, and both crews were laid off between December 16 and December 26. Despite some minor variation between the two crews on any given day in December, their work-time remained generally consistent with one another, as it had in the past.

Third, even though the Palacio crew began working in the lettuce harvest in January, 1979, thus making difficult a continued comparison with the Rios crew's weeding and thinning work, it appears that the Palacio crew was not disfavored during early 1979. During the pay periods of January 20 and 27, February 3, 10, and 24, March 3, 10, 17, and 24, the Palacio crew in general worked substantially more total hours than the Rios crew (even in light of the fact that the Palacio crew was larger). Generally, during these pay periods the Palacio crew worked either longer or more days than the Rios crew. Yet, during a comparable three-month time period in 1978 both crews worked almost identical daily hours, thus suggesting that on a comparative basis it was the Rios crew that fell behind in work-time between January and March, 1979.

A final consideration arises with respect to the Palacio crew's layoff between March 26 and April 25, 1979, an unusually long layoff for the Palacio crew at that time of year. Although the Rios crew continued working during this time, the

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[67] In contrasting the Rios and Palacio crews, two approaches are put forward. The General Counsel seeks to focus attention on the daily work-hours put in generally by the main body of the crews (not including the work of foremen and helpers), while the Respondent seeks to focus attention on the average weekly work-hours performed per worker in the two crews. The Respondent's averaging by worker, however, fails to consider the workers absent on any given day and the guaranteed work time provided to the foremen and helpers. In my analysis of the time records, I have generally employed the General Counsel's approach by focusing on the number of work-hours in any given day that were performed by the main body of each crew, even though on any given day certain employees worked more or fewer hours than the crew in general.

significance of this long layoff for Palacio's crew is by no means clear. Initially it should be noted that this layoff occurred some three months after the decertification election had taken place. Moreover, in the past on one occasion or another one of the two crews in question was laid off while the other was not. Thus, the Palacio crew was laid off during the weeks of April 22 and September 16, 1978, while the Rios crew was laid off during the week of August 5, 1978. In other words, a layoff of one crew or the other was not unique, even though in the past such single layoffs had not been of long duration. It is also of some significance that of the 25 work days missed by the Palacio crew between March and April of 1979, the Rios crew likewise did not work on 10 of those days, thus making the Palacio crew's layoff less dramatic than it might otherwise seem.

In view of all the foregoing considerations, it is difficult to see, one, whether a distinctive decrease in work-hours actually was experienced by the Palacio crew, particularly before its general layoff in latter March, 1979, and, two, a factual connection between the Palacio crew's work-time and its open support for the UFW. Except perhaps for the Palacio crew's 1979 layoff, the Rios crew, which more openly favored decertification, did not seem to reap a distinctive work benefit in comparison. It is, therefore, not possible to find that the evidence supports a conclusion that the Palacio crew's work-hours were decreased in comparison to those of the Rios crew.

III

THE GROWING AND HARVESTING OF RAPINI

A. Respondent's Decision to Discontinue Rapini.

Rapini, a mustard green and member of the broccoli family, was a crop grown for some 12 years by the Respondent. Between 160 and 200 acres were annually devoted to the crop. Rapini was one of Respondent's most labor-intensive crops, needing up to 140 workers to harvest it, which generally occurs in December, January, and February.

In 1978 the Respondent did not plant rapini, but the reasons behind this planting decision are not clearly portrayed in the evidence. Ben Abatti asserted that in April he decided not to plant rapini because "we weren't making any money with it," and because the Company had lost money on the crop the past year. Abatti acknowledged that the Company did not lose any more on the crop in 1977-1978 than it had the prior year, and no records were introduced to demonstrate the nature or size of the claimed loss.

When Abatti first testified he cited only the loss of money and the desire to plant the land with a more stable crop as reasons for not growing rapini. When he reappeared as a witness he brought forth two additional reasons: one, that he feared he would not have sufficient time to devote to the crop because of a criminal indictment he was served with in April and two, that he feared a strike at the end of the UFW's contract, at the end of December, and did not want to risk such a labor-intensive crop. The fact that these two reasons were newly added by him as reasons for not growing rapini, after he had failed to mention them when he was first extensively examined regarding his planting decision, leaves his rationale for not growing rapini open to doubt. Indeed, when questioned further during his second appearance as a witness, Abatti again changed his testimony, acknowledging that the UFW's contract term played no role in his planting decision, which he claimed was made even before the contract was entered into, in June. In fact, Jim House claimed that Abatti told him in January that the Company would not grow rapini, which, if true, also indicates that the criminal indictment played no role in Abatti's decision.[68]

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[68] In disputing Mr. Abatti's claim that the rapini market was unsatisfactory in 1977-1978, the General Counsel sought to introduce certain market data referring to rapini, purportedly put out by the United States Department of Agriculture. No witness identified the data as coming from official government reports or testified concerning any use or reliance that persons may place in the reports. Nor were the data complete for the time periods under scrutiny. For all these reasons, I have determined that the reports submitted as General Counsel Exhibit 61 are not admissible, and I have not considered them.

Instead of the Company growing rapini, the crop was grown by Albert Studer, Ben Abatti's brother-in-law. Studer recalled that Abatti told him that the company "made a couple of bucks on it every year." Studer denied that Abatti informed him that Respondent had lost money on the rapini crop and claimed he would not have grown it had Abatti mentioned any such loss.[69] Studer recalled that he spoke to Abatti in the summer of 1978 and that Abatti asked him "if I wanted to take the crop over." According to Frank Preciado, a foreman of one of Respondent's weeding and thinning crews and who customarily worked in the rapini harvest stitching boxes (not as a foreman), Studer informed him "that Ben Abatti had not planted rapini this year because of the union . . ."[70]

Albert Studer maintained his own small farming operation, leasing out 200 acres to others and growing his own crops on the remaining 200 acres. In the past five years he had grown only such stable crops as alfalfa and wheat, and before then beets and cotton. He had never grown a labor-intensive crop or hired his own employees, having necessary work performed by others on a custom basis. In 1978, this admittedly conservative person decided to grow what appears to be a high-risk crop, requiring substantial capital ($600.00 to $800.00 per acre to begin with, and a total investment of $2,500.00 to $3,000.00 per acre). In addition to being Ben Abatti's brother-in-law, Studer was one of Respondent's full-time tractor foremen and the Respondent's equipment supervisor; he continued working full-time in these positions thoughout the growing and harvesting of rapini.

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[69] Abatti testified that the only reason he gave to Studer for not growing the rapini was that the Company could not make any money on it.

[70] The quotation above is taken from Preciado's sworn declaration, which was taken from him and read to him by Ellen Sward, an Agricultural Labor Relations Board agent, and which declaration Preciado signed in December during the rapini harvest. When called as a witness, Preciado attempted mightily to disclaim his declaration, but his disclaimer was wholly unconvincing and, indeed, was contradicted by his own half-hearted acknowledgment of having signed the sworn statement. His declaration stands as a glaring inconsistency to his testimony and was admissible as such.

Studer's land was initially prepared for rapini planting in mid-August. The planting occurred in mid-September. In accomplishing these two tasks, as well as the subsequent irrigation work, the Respondent's equipment and employees were used. Although Ben Abatti claimed that Studer was charged for this work at the ordinary custom work rates including overhead charges, Studer acknowledged that he did not pay any overhead charges to Respondent for the land preparation and planting work; in fact, rather than being billed within the normal 30 to 90 days for that work, Studer admitted that he was not billed by Respondent for that work (which billing responsibility was Studer's in his capacity as a Company tractor foreman) until February, 1979.[71]

B. The Decision Not to Harvest the Rapini.

The rapini harvest began approximately December 6 or 8, initially employing 20 to 30 workers and then eventually employing approximately 120 workers. The harvest ended on February 17, 1979. Most of the workers who harvested Albert Studer's rapini came from the crews of Panfilo Avina, Angel Avina, Frank Preciado, Thomas Romero, and Ray Velez, Sr.

Ben Abatti and Albert Studer claimed that the reason why Company employees harvested the rapini was because in December the Company's melon crop was frozen and it became necessary to lay off employees, at which point Albert Studer decided to hire them. According to Abatti and Studer, the freeze, layoff, and re-employment all took place on or about December 6, immediately before the rapini harvest began.

Other facts in evidence, however, indicate that Studer's employment of the Respondent's employees was not due to a

[71] In discontinuing the rapini crop, the Respondent neither advised nor bargained with the UFW over the discontinuance. Yet, the UFW contract, signed in July, provided for a separate work classification for rapini harvest employees and for a rapini harvest piece rate.

fortuitous turn of weather. For example, Sam Hartman from Beach Street, which medically insured "Studer's employees," recalled that he was informed in latter November that a medical insurance plan was wanted for Studer's harvest workers. Yet, according to Studer he was at that time still intending to employ a labor contractor for the harvest, which would not have called for his having medical insurance. Angel Avina, though seeking to downplay the significance of his admissions, admitted being informed up to two or three weeks before the harvest that he and his crew would be working on Studer's rapini. And, except for the rather common, brief layoffs experienced by some of the employees, following the melon harvest, Respondent's employees went directly from their work at the Company to the Studer rapini harvest, without suffering any exceptional layoffs (many did not seem to experience any distinctive break in their work). Moreover, it is difficult to accept Studer's proposition that he had made no definite harvest arrangements until a day or two before it began, particularly in light of the substantial financial stake in the rapini and the fact that rapini can be very difficult to harvest if not done in a prompt fashion.

No one who was associated with the rapini harvest could identify any difference in the harvest due to the fact that the rapini was allegedly Studer's, except that the workers were paid with Studer's checks. The foremen and sub-foremen were all the same as had worked in Respondent's past rapini harvests. The trucking service used to deliver the rapini to the shed was the same. The boxes in which the rapini was packed were Company boxes, identifying the Company as the grower and shipper. Ray Hernandez, the Company's general foreman, regularly visited Studer's rapini field throughout the harvest. The piece-rate paid to workers for the harvest was the same piece-rate as established in the UFW's contract with the

Respondent.[72] And, when the harvest was over, the workers continued, just as they had in the past, with their other work at the Company. Yet, when 98 rapini harvest workers voted in the decertification election on December 27, their votes were challenged because they were not on Respondent's payroll during the eligibility week, the week of December 16.

Studer explained that he personally employed the workers to harvest rapini, rather than contracting with a custom harvester or labor contractor as he had in the past, because he wanted to save the 25% overhead cost that a custom harvester or contractor would charge. But, when one reviews Studer's expense sheet for the harvest one sees that his own overhead was between 23% and 26% of his labor costs (depending on whether one adds into the overhead the $8,344.00 for the trucking service).[72]

The ostensible relationship between the Company and Studer with respect to the rapini is set forth in a written contract dated September 2. Essentially this contract portrays as Studer's responsibilities the owning, growing, and harvesting of the rapini, and portrays as the Company's responsibilities the packing, shipping, and selling of the rapini. It is noteworthy that this contract explicity states, *inter alia:*

> Shipper (the Company) is an experienced grower and shipper of broccoli raab and holds no interest in the current crop. Shipper will have no responsibility in the growing of broccoli raab or the field harvesting as shipper has no monetary interest in the crop.

In portraying Studer as the sole owner of the rapini and as having total responsibility over its harvest and growing, this contract is unique to the Respondent's practice. Every other contract that the Respondent, as a packer and shipper, has entered into with other growers during the past several years

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[72] It is interesting to note that Studer explained that he paid a piece-rate of 10¢ per pound, rather than 9½¢ per pound that was paid by the Company before the UFW contract began, because it was easier to calculate in round numbers, a decision which cost Studer over $9,000.00 in wages.

provided for extensive control by Respondent over the growing and harvesting of the crop to be sold by it. Although the contract itself is dated September 2, Studer testified that it was signed in latter November or some three to four weeks before the harvest began, he was not sure which.

C. The Economic Relationship Between Albert Studer and the Company.

The written contract between the Company and Albert Studer with respect to the rapini harvest guaranteed to the Company $2.75 per carton of rapini for packing, shipping, and selling the rapini. When one examines this contract rate in connection with the 1978-1979 harvest, one can see that the Respondent, as much as Albert Studer, gained a substantial financial return from the rapini.

According to the records produced and Studer's testimony, Studer harvested approximately 92,600 cartons of rapini. Two methods can be employed to arrive at this total harvest figure. First, one can add the 71,674 cartons that Studer actually sold and was paid for by the Respondent to the 21,000 cartons that he estimated as being wholly or partially lost or damaged in shipment.[73] Second, one can take Mr. Studer's expense sheet for the harvest, which he prepared to demonstrate his total costs, and we see a "shipping charge" of $254,655.50, which at $2.75 per carton indicates that a charge was calculated for 92,602 cartons. This "shipping charge," which was Studer's payment or credit to the Respondent, was apparently calculated for the entire harvest, including the shipping losses.

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[73] Although the trial transcript indicates that Studer testified he lost 21,000 "bucks" in shipping losses, the transcript is in error. Studer's reference was not to "bucks" but to the loss of 21,000 *boxes*, as is evident from the related interrogation concerning his losses. A total harvest figure of some 92,000 boxes or cartons is also consistent with Studer's general estimate that he harvested about 500 cartons per acre. It might be noted that each carton contained 20 pounds of rapini.

From the available harvest data, it appears that Albert Studer's personal gain from the rapini was approximately the same as that of the Respondent's. Studer's gain can be calculated from the following data: from the sale of 71,674 cartons a gross return of $551,168.53 was generated,[74] and by estimating the loss of 21,000 cartons at a possible gross return of $195,510.00, if Studer is successful in pursuing his claims for the shipping losses.[75] Thus, a gross return of $746,678.53 might be realized for the sale of the rapini. Against this figure Studer's expenses of $626,061.24 must be subtracted, leaving him a net profit of approximately $120,617.29.[76]

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[74] Out of this $551,168.53, Studer only received $354,065.03, after a deduction was made of $197,103.50 for the payment to the Respondent for its shipping charges. These figures are evidenced by the payments made from the Respondent to Studer for the sale of the 71,674 cartons.

In calculating Studer's profit from the rapini, however, it is best to keep the calculation based, first, on the gross revenues generated by the rapini, and, second, by then deducting from those gross revenues Studer's total expenditures, as evidenced from his expense sheet. The General Counsel's brief erroneously calculates Studer's rapini profit by failing to keep the "gross" and "net" calculations distinct. The General Counsel uses Studer's net return of $354,065.03 in estimating his potential profit, but ignores the fact that the $197,103.50 in shipping charges that went to Respondent (as part of the same transaction regarding the sale of the 71,674 cartons) is a charge that is also included in the total shipping charges of $254,655.50, as set forth on Studer's total expense sheet. Thus, the General Counsel twice subtracts the $197,103.50 in shipping charges from the rapini returns (first by crediting Studer with only the "net" return from the sale of 71,674 cartons and then by subtracting from his returns the total shipping charge of $254,655.50), thereby erroneously concluding that Studer could be expected to gain virtually nothing by way of the rapini.

[75] The rapini was sold at various prices: $5.65, $8.19, $10.70, and $12.98 per carton. It is unclear what price, or prices, was agreed to for those cartons lost or damaged in shipment. Thus, a median figure of $9.31 per carton has been employed herein for the purpose of estimating the possible returns that Studer might receive from the 21,000 lost or damaged cartons.

[76] To a large extent the net profit Studer will receive for the rapini depends upon his recovery for the lost shipments. At the time he testified, he had received only $551,168.53 in gross receipts and had listed some $626,061.24 as his expenses. His expense sheet did not take into consideration certain fertilizer work which would further reduce his profit.

By examining the $2.75 per carton charge that the Respondent received for packing, selling, and shipping, it is also possible to form an estimate of the financial gain that Respondent achieved from the rapini harvest. In making this examination, one first must look to the testimony of Howard Hall, the president of a large, unrelated packing and shipping company in the Salinas Valley, which testimony set forth the costs and profits that can be expected for performing functions similar to those of the Company. Mr. Hall testified that a basic cost (before profit) of 60¢ per rapini carton would be normal for the packing, shipping, and selling of it. A normal charge to the grower by Hall's company would then amount to $1.10 per carton, thus leaving Mr. Hall's company a profit of between 50¢ and 55¢ per carton. Mr. Hall saw no reason why a higher charge would be made or warranted, unless other costs were involved in the packing process.

Ben Abatti claimed that the Respondent had certain extra costs in its operation regarding the rapini, over and above those described by Mr. Hall, which can be added in when estimating the Respondent's costs. Thus, the Company claimed the following costs in addition to those set forth by Mr. Hall: .015¢ for stitcher wire, .015¢ for staples, 10¢ for additional ice, 20¢ for hydrocooling, and 75¢ for the rapini boxes (bought by the Company). These extra costs to the Respondent, as pinpointed by Mr. Abatti, would bring the total per carton cost to $1.68 per carton, founded on Halls' basic cost estimate of 60¢, leaving the Respondent with an estimated profit of $1.07 per carton.

Thus, an estimate can be made that the respondent profited from the rapini in the amount of $99,161.18 (if one uses the figure of 92,674 cartons for the harvest). To be sure, one cannot stand on this estimated profit as hard fact, but in view of the testimony, the sales, and the reasonable cost estimates put forward, it surely seems that the Respondent stood to make a substantial gain from the rapini, approximating the profit that Studer might receive. Indeed, in view of the Company's guaranteed rate of return from each box of rapini, the Company was reasonably certain from the outset to profit handsomely from Studer's rapini.

No reason is apparent in the record for concluding that Mr. Hall's company in Salinas would have costs incomparable with those of the Respondent. His company provides exactly the same service to growers. Mr. Hall, who had no stake in this proceeding and who had many years' experience in packing and selling agricultural products, testified in a most forthright and credible manner, and he appeared cautious in his testimony and cost estimates. Although his company did not have extensive experience in selling and shipping rapini, its shipping and selling of comparable agricultural goods (including a small amount of rapini) seems wholly applicable to rapini. There appears to be no particular magic or uniqueness to the shipping and sale of rapini that would distinguish its costs from those of numerous other, similar products shipped and sold by Mr. Hall's company.[77]

ANALYSIS AND CONCLUSIONS

I

THE RESPONDENT'S ROLE IN THE DECERTIFICATION CAMPAIGN

A. Introduction.

A key charge in both the General Counsel's complaint and the UFW's election objections petition is that the Respondent unlawfully instigated and supported the effort to decertify the UFW. Several of the complaint's subparagraphs allege that Respondent, through its agents, threatened, promised, and

[77] To be sure, Ben Abatti claimed that his cost for the shipping and selling of rapini was somewhere around $2.50 per carton, thus indicating a profit to him of only 25¢ per carton. At no time was Abatti, or the hearsay cost estimate of his accountants that was offered as evidence (but not admitted), able to analyze that cost figure or break it down intelligibly. Nor is it apparent why the Company's cost for icing, closing the boxes, shipping, and selling the rapini would have been so much higher than those of another large, professional packing house which performed identical functions. Mr. Abatti's conclusory cost estimates appeared no more credible than much of his other testimony.

benefited employees in order to encourage them to support the decertification effort. Both the General Counsel and the UFW seek to set aside the decertification election held on December 27.

Of course, it is "unlawful for an employer to instigate and promote a decertification proceeding or induce employees to sign any other form of union-repudiating document. . . ." *N.L.R.B.* v. *Sky Wolf Sales*, 470 F.2d 827, 829 (9th Cir. 1972). To be unlawful the employer's conduct must go beyond simple, innocuous assistance to employees seeking to decertify a union. *See, e.g., Southeast Ohio Egg Producers Corp.*, 116 NLRB No. 130 (1956); *Belden Brick Co.*, 114 NLRB No. 13 (1955); *Solar Aircraft Co.*, 109 NLRB No. 22 (1954). The employer's conduct must affirmatively encourage or promote the employees to engage in a decertification effort, or the employer must give active assistance and support to such a decertification effort, before the employer's conduct becomes unlawful. *See N.L.R.B.* v. *American Casting Service, Inc.*, 365 F.2d 168 (7th Cir. 1966); *Wahoo Packing Co.*, 161 NLRB 174 (1966); *Sperry Rand*, 136 NLRB No. 45 (1962).

In determining whether the Respondent unlawfully instigated and promoted, or unlawfully assisted and encouraged, the decertification campaign led by the Petitioners, a careful scrutiny must be given to all the record facts and to the inferences naturally flowing from them. In a review of the evidence, the fact-finder cannot close his eyes to pervasive imponderables either, for "(t)he detection and appraisal of such imponderables are indeed one of the essential functions of an expert administrative agency." *International Association of Machinists* v. *N.L.R.B.*, 311 U.S. 72, 79 (1940). Furthermore, when weighing the record facts and evaluating their import, one cannot ignore the important role played by witness credibility. After all, the demeanor of a witness "may satisfy the

tribunal, not only that the witness's testimony is not true, but that the truth is the opposite of his story . . . ."[78]

And in evaluating the many and subtle facts in this proceeding, one also must be concerned with the sensitive issue at stake. Full enforcement must be accorded to the employees' right to disassociate from their collective bargaining representative through a free and fair decertification election, but protection must also be accorded to assure that they not be interfered with in their right to continue being represented by their designated collective bargaining representative. The initial, and perhaps most profound, question in this case is whether the credible record evidence is sufficiently persuasive to call for concluding that the Respondent's employees did not freely exercise their right to decertify the UFW as their bargaining representative, as the General Counsel and the UFW argue.

B. The Factual Analysis.

Any factual analysis concerning the Petitioners' decertification campaign must begin with those facts that naturally arise to cast such a strong and doubting light on the very commencement of their campaign. Although it may be fair to say, as the Respondent emphasizes, that many of the Respondent's steady, year-round employees began rebelling against the UFW as their representative because of their dislike for the UFW's medical insurance coverage, this explanation falls short of providing a workable, realistic rationale for understanding just how Manuel Castellanos and Toribio Cruz, the two decertification leaders, came to lead a decertification effort. Neither one possessed any particular knowledge about decertification procedures. Indeed, Manuel Castellanos's explanation about how he came to learn about gathering signatures was not only incredible (and self-contradictory) but fails to explain how he came to begin soliciting signatures at the

[78] *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 408, quoting with approval Judge Learned Hand in *Dyer v. MacDougall*, 201 F.2d 265, 269 (2nd Cir.).

strategic time that he did, believing as he did that the UFW's representation would cease of its own accord when the contract would expire in only one more month.

Neither Castellanos nor Cruz had any particular dislike for the UFW when he began his decertification effort, neither had any particular experience with the medical insurance program to lend credence to his attack upon it, and neither professed to have much interest in the success of his decertification activity. Both Castellanos and Cruz testified in such a fashion as to make their testimony incredible: Castellanos openly altered his testimony, and Cruz made it impossible for others to grasp his testimony by constantly changing it and making it hopelessly vague and confused. Yet, each of these decertification leaders forsook his steady work and wages, each for a substantial time, to engage in a campaign that neither one much cared about or understood, according to their own testimony. Although the work-time they lost through their decertification activity may have been more substantial than either man originally anticipated, neither man evidenced a sufficient interest in the outcome of that activity to make it likely that he would have continued on his own to have foregone substantial work and wages when that sacrifice became obvious and necessary.

The imponderable factors surrounding Cruz's and Castellanos's leadership role in the decertification effort, and their lack of candor as witnesses, are cast against a backdrop that reveals many strong connections between them and the Respondent's upper management. Of course, both were longtime, steady workers. Castellanos, more than most steady workers, had benefited from the Respondent's generosity in receiving numerous pay advances and funds by way of cosigned bank loans. He continued to benefit directly at the hands of Respondent's top management official, Ben Abatti, during and after the decertification campaign, first, by continuing to receive substantial pay advances and, second, by becoming privately employed by Ben Abatti, after December 6.

Castellanos also received a substantial "Christmas bonus" around the end of December.[79]

Cruz, like Castellanos, also received certain benefits from the Respondent during the decertification campaign. He was given a letter by Respondent which could allow him to immigrate his family to the United States, a letter dated around the very time that Cruz joined in the decertification campaign. He was given pay for work on December 13, though he performed no work that day. (December 13 fell within the pay week used to determine voter eligibility for the decertification election, and had Cruz not been credited with work that day he would not have been eligible to vote in the election, as he worked no other day that week.) He was allowed to make a charge on Respondent's business account to replace a car window believed to have been damaged by UFW sympathizers, a charge which the Respondent — contrary to its regular practice — made no effort to recapture from Cruz for four months, or until shortly before the hearing began. He also received a substantial payment from Respondent at the end of December; although described as a "Christmas bonus," Cruz's payment was four times larger than any other comparable payment or bonus evidenced in the record. Cruz received this

[79] One's curiosity is aroused by Castellanos's "discharge" from the Respondent on or about December 6. Frankly, it is impossible to conclude that he was discharged for failing to become a UFW member, as he claimed. For one thing, Castellanos admitted thinking that he would not have to be a member after the UFW's contract expired, which meant that, at most, he believed he would have had to join the UFW for a month, a seemingly small consideration to save 14 years employment. For another thing, he was well aware of the decertification campaign and, thus, the possibility that the UFW would be rejected as the employees' bargaining agent, in which case his "forced" membership would be short lived indeed. Finally the Respondent had refused for over four months to enforce the Union membership requirement in the UFW contract, and no apparent reason emerges as to why suddenly Castellanos would be compelled to leave his employment because of that requirement. It might also be noted that Castellanos left his job immediately after he and Cruz had filed for the decertification election with their second petition, and Cruz, as well, departed from the scene, leaving for Mexico on a purported immigration matter. Thus, the two decertification leaders suddenly disappeared immediately following the submission of their petition, and Castellanos's whereabouts were somewhat shrouded in mystery, so much so that both he and Ben Abatti initially concealed the fact that Castellanos was privately hired by Abatti to work at his feed lot.

substantial year-end payment even though he had missed nearly four straight weeks of work without authorization (according to him), an act of "generosity" on the part of the Company that contrasts starkly with its treatment of Rosa Briseno, who had missed work for only one day without authorization and lost her seven years of seniority as a result.

When Cruz's second decertification petition was dismissed, he was immediately visited at home by the Respondent's chief labor relations official, Jim House, and immediately following that visit Cruz's decertification activity took on the assistance of legal counsel, largely through the help of House. Thomas Slovack, a lawyer from Palm Springs, was recommended to Cruz by the Company's labor counsel, was then contacted initially and interested in representing Cruz not by Cruz but by the Company's labor counsel, and immediately thereafter conferred in person with the Company's labor counsel regarding the dismissed petition, even before meeting with Cruz. Slovack's subsequent meeting with Cruz was arranged by the Company, and Cruz was driven to and from his first meeting with Slovack by Jim House, Slovack's brother-in-law. From then on Slovack represented Cruz without charge, using the office of Respondent's labor counsel much as if they were his own, without reimbursement for any rental expenses.

The Respondent's consideration toward Toribio Cruz was similarly evident out in the fields where the decertification campaign took place. When he met with various field crews to solicit workers' signatures for the decertification petitions, the Company's field foremen uniformly allowed him work-time in which to engage in his solicitations. In the case of Panfilo Avina's two crews, the melon harvest machines were actually shut down and employees were given extended time at the edge of the field in order to speak with Cruz and sign his petitions. This occurred once with respect to the portion of the crew led by Trinidad Soto and at least once with respect to the portion of the crew led by Manuel Galindo; in both instances these crew

leaders ordered their melon harvest machines shut off so that Cruz and Castellanos could solicit workers during their normal work-time.[80]

When Cruz solicited signatures among the lettuce thinning crew of Angel Avina, Avina gave him permission to talk with workers at the edge of the field as they turned into new work rows, again allowing for the solicitation to take place during normal work time. Pedro Palacio helped Cruz by calling out of the crew bus a group of workers which was sitting inside waiting for work to begin, after which their signatures were solicited by Cruz and Eva Donate, who had left her work on the Rios crew to engage in soliciting Palacio's crew. Prior to this pre-work solicitation, Palacio had prewarned crew members that Cruz would be coming to get their signatures. Thomas Romero, another crew foreman, allowed Cruz to twice solicit his crew members outside his work fields as they were turning around during the course of their work. And Cruz spent about 15 minutes talking with members of the Padilla crew as they were at work harvesting lettuce inside the field.

On December 16, at a Company-sponsored party, Cruz and Donate again solicited decertification signatures from the members of Pedro Palacio's and Jose Rios's crews who were in attendance. This large-scale solicitation took place while Company officials such as General Foreman Hernandez and Jim House were present, not to mention the presence of Foremen Rios and Palacio. The party-time solicitation took place just following the dismissal of the second petition and just

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[80] Although the Respondent denies that either Soto or Galindo are supervisors within the meaning of the Act, I find that they hold such positions for the Company that it can be held accountable for their conduct in question. They were clothed with authority to direct the work forces while in the field and generally oversaw the work of over 20 employees each. Panfilo Avina, the main crew foreman, rarely entered the fields. Soto and Galindo directed workers when to begin and end their work and when to take their breaks. Clearly, the employees would have reasonable cause to view them as acting as Company agents when Soto and Galindo directed that the harvest machines be shut off so that the decertification drive could take place during normal work-time; such orders were well within their general range of authority.

prior to the layoff of the Palacio and Rios crews, which would make further solicitation of those crews for a third petition more difficult. Jose Rios personally assisted the decertification campaign on December 21 or 22, when he chauffeured two of his crew members to at least two different locations, during a last-minute effort to get enough signatures on the third decertification petition in order to qualify it for an election. Rios had also warned at least one worker, Jose Armando Fernandez, who had refused to sign any but the first petition that those workers who did not sign for decertification would be laid off from their jobs.

Then, within days of the election, just as Mr. Cruz and Mr. Castellanos had been telling employees the Company would do, the Company began setting plans for a new, improved medical insurance program for the workers. The implementation of this was agreed to by the Company within the first week of January, 1979, but insofar as the record reflects the medical plan was not then needed, as the UFW's existing medical insurance program would cover employees for an additional one to three months; thus, a substantial, unnecessary cost was undertaken by the Company. In addition, Cruz and Castellanos were qualified by the Company under its new medical insurance program even though neither one of them had sufficient eligibility under the plan's terms.

Against the foregoing factors, all of which would appear to closely identify the Respondent with the Petitioners and their decertification campaign, the Respondent notes three basic considerations. First, that Respondent's benevolence toward Cruz and Castellanos fits within a pattern of similar treatment toward other senior, steady employees; thus, as the Company points out, among such workers, particularly among the ranks of tractor drivers and irrigators, it was not uncommon for the Company to provide pay advances, or letters for immigration, or to allow them to charge personal items on Company charge accounts, or to permit them to take off a substantial time from work without express authorization. Second, the decertification

campaigning that took place in the fields during work-time was not unlike the treatment accorded to UFW representatives, who, according to several employee witnesses, visited various crews during work-time prior to the election and were permitted to campaign in behalf of the UFW without the Company's intervention.[81] Third, the Respondent points out that no direct evidence exists that Respondent conspired with Cruz or Castellanos in respect to the decertification campaign.

The Company's basic contentions, however, tend either to ignore individual factors of great significance or to disregard those conclusions most naturally emerging from the factual circumstances generally surrounding the decertification campaign. Thus, one should keep in mind that the Petitioners' decertification campaign arose in the context of Respondent's hostility toward the UFW, as evidenced from its unlawful conduct in 1976 when the original representation election took place, as well as by its continuing lack of cooperation with the UFW to fulfill even such basic contract requirements as by failing to compile current employee lists and seniority lists, its refusal to enforce the Union membership requirement until the contract was nearly expired, and its open hostility toward UFW representatives, such as can be seen through Ben and Tony Abatti's reaction to Victor Gonzalez or Ben Abatti's remarks to

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[81] Although it appears that the UFW did not wage any concerted campaign in opposition to the move for decertification, inasmuch as it did not have sufficient manpower to wage such a campaign, and although the level and extent of the UFW's presence in the fields during work-time prior to the election is neither clear nor precise, it is fair to conclude that UFW representatives were present in the fields during work-time prior to the election and spent at least as much time as Cruz and Castellanos campaigning during the employees' work time. After all, the evidence does not establish that Cruz and Castellanos spent a substantial amount of time during the employees' normal working hours campaigning, but rather that they appeared mainly during brief intervals during work time. Although not charged in the complaint, if it were it would be difficult to conclude that Respondent evidenced sufficient favoritism toward Petitioners' work-time campaigning, as opposed to the UFW's, so as to make out a violation of Section 1153(b)'s prohibition against unlawful support and assistance. *See Bonita Packing Co.*, 3 ALRB No. 27.

Rosa Briseno. This anti-UFW attitude is further manifested through the glaringly disparate treatment accorded to Toribio Cruz and Rosa Briseno, who experienced such distinctively different responses from the Company as a result of their unauthorized absences from work, even though their conduct was governed by similar provisions of the labor contract.

The most significant features of the Respondent's relationship with Castellanos and Cruz, as just briefly reviewed, do not stem from its providing them those amenities of employment that may have been similarly bestowed on other senior employees, but from Respondent's overt support and assistance that was provided them at crucial stages of the decertification campaign. Although the Respondent engaged in little direct campaigning in behalf of the decertification petition, the Respondent measurably helped to sustain and encourage that campaign by providing Castellanos and Cruz with substantial "bonuses" which helped restore the wages they lost as a result of their campaigning during work-time, by seeking and arranging for legal counsel in behalf of Cruz when difficulties developed with the second decertification petition, by insuring Cruz for the property damage he sustained as an apparent result of his decertification involvement, by providing a captive party audience from which a third decertification petition could be launched, by tracking down and helping to contact additional petition signers when only a few additional signatures were needed to validate the final petition, and by making good on the Petitioners' major campaign promise that Respondent would improve the medical insurance program if the UFW were defeated. Coupled with these strategic acts of assistance to the Petitioners was the general permission granted to them by the Company to campaign during the employees' normal work-time, without interruption or interference from crew foremen. These consistent, telling features of Respondent's conduct *vis-a-vis* Cruz and Castellanos clearly warrant the conclusion that the Company either initiated the decertification campaign in the first place, taking advantage of the general lack

of support for the UFW among its steady, full-time workers, of which the Respondent was well aware, or that the Respondent carefully watched the campaign and acted to rescue it whenever it ran into serious difficulties. In either case, the Respondent's conduct was that of an active participant and supporter.

Nor can it be surprising that little or not direct evidence exists that Respondent conspired with the Petitioners in furtherance of the decertification campaign. One cannot expect that Cruz, Castellanos, or Ben Abatti would admit openly to such a conspiracy, particularly in view of their evident willingness to camouflage even the many smaller links that tied them together during the campaign, as noted throughout this decision. Much in the manner of their testimony forces a conclusion that they were closely bound together in a common attempt to decertify the UFW; otherwise, their testimony would have been far more candid than it was. The fact that their collusion was not perfectly concealed does not indicate such collusion did not exist, nor does the fact that their collusion was not more overt and aggressively carried out. Based on all the credible facts (even including those that will be discussed in subsequent sections), I have concluded that the evidence demonstrates that Respondent violated Section 1153(a) of the Act by interfering with, restraining, or coercing employees in their protected rights by actively supporting and assisting the Petitioners in their decertification campaign.

II

THE RESPONDENT'S DISCRIMINATORY CONDUCT

Section 1153(c) of the Act provides it to be unlawful for an employer to discriminate "in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." Generally, in testing an employer's treatment of an employee, whether it be by way of discharge, layoff, or other discipline, "the motive of the employer is the controlling factor.

**** The Board must sustain its burden of showing evidence on the record as a whole which establishes a reasonable inference of causal connection between the employer's anti-union motivation and the employee's discharge (or other disability)." *N.L.R.B.* v. *Mueller Brass Co.*, 509 F.2d 704, 711 (5th Cir. 1975). The evidence must persuasively show that the conduct in issue has as its moving force, albeit it may not be the only force, the employer's anti-union motive. *S. Kuramura, Inc.*, 3 ALRB No. 49.

Charges raised in the General Counsel's complaint allege that Respondent discriminated against employees in violation of Section 1153(c) of the Act by, one, laying off or discharging Clemente Fernandez and four of his co-workers and, two, by eliminating Rosa Briseno's seniority and withholding her from work.[82] These two issues, reviewed extensively in regard to their facts, will now be considered with respect to the conclusions flowing from those facts.

A. Clemente Fernandez and His Group.

Of the facts extensively set forth earlier with respect to the layoffs involving Clemente Fernandez and his family, several major conclusions emerge. First, Clemente Fernandez was an active UFW representative and supporter in the crew of Jose Rios. He and his wife, Gregorio, were the only two members of the crew who consistently refused to sign the decertification petitions; his son, Jose Armando, followed their example by refusing to sign any petition after the first one. These three

[82] The complaint also alleges two other violations of Section 1153(c). First, it asserts that Respondent discriminatorily decreased the work-hours of Pedro Palacio's crew due to its support for the UFW, but as it was earlier noted, the evidence failed to sufficiently establish that such a decrease in work-hours took place in fact — and, therefore, I have determined there is no factual basis for inquiring into whether Respondent acted unlawfully. Second, the complaint asserts that Respondent discriminated against employees by subcontracting the growing and harvesting of rapini, a charge that will be considered in the subsequent section of this decision.

employees were laid off by Rios on December 12, along with Francisco Salas and Maria Torres, two workers who rode to work with Clemente Fernandez.

Second, the Rios crew was an important one in respect to the possible success of the decertification drive. A sister crew, that of Pedro Palacio, had unanimously rejected the move for decertification. Other crews, such as Angel Avina's, also had refrained from supporting the campaign or were less uniformly in favor of it than was the Rios crew. And, it will be recalled, Jose Rios, more than any other foreman, became personally involved in the decertification drive by chauffeuring two signature gatherers and by warning that layoffs would occur for those who did not sign the petition. His crew's party on December 16 was also used as an opportunity by the Petitioners to gather signatures on the third and last decertification petition.

Third, the selection of layoffs in the Rios crew makes little sense unless one concludes that the Company was attempting specifically to eliminate Clemente Fernandez and those associated with him. Although Rios claimed he selected those to be laid off on the basis of seniority, it is fair to conclude that under the terms of the then existing UFW contract at least four other workers had less seniority than Fernandez: Eva Donate, Maria Valdez (who was laid off the next day because of Rios's "mistake" in seniority), Adelina Moreno, and Armida Vega. No explanation is evident as to why these four workers were passed up when Rios selected his layoffs.[83] Furthermore, if one accepts Rios's explanation that he was instructed to cut his crew

[83] It should be recalled that when he made his layoffs Rios had not seen the Company's printed seniority list. He admittedly believed that Donate had begun after Fernandez did (and, in any case, she would have lost any greater seniority than the Fernandez group under the UFW's contract because she had left her bargaining unit work). He had laid off Moreno and Vega as the most junior employees just the previous December, after the Fernandez group was hired in August, thus considering them at that time as junior to the Fernandez group. No adequate explanation has been put forward to justify the change in Rios's belief regarding the seniority of Moreno and Vega, unless he was specifically intending to eliminate the Fernandez group. And, he should have known that Valdez was more junior to the Fernandez group.

back to 25 or 26 employees, no need would have existed to have laid off first five and then a sixth employee. Rather, he would have needed to lay off only three or four employees. In this connection it should be recalled, as noted earlier, that in the following months several new employees periodically joined the Rios crew, including Maria Valdez who permanently returned to the crew only a month after the layoffs. (Valdez, it will be recalled, never left the Company's employment, being placed with another of the Company's crews the day after her "layoff" from the Rios crew.)

Fourth, a few days before Fernandez and his group were laid off by Rios, the general foreman, Ray Hernandez, was overheard by Fernando Franco telling Rios to discharge his crew's UFW representative, according to Franco's credible testimony. Hernandez's order to Rios was issued either on the same day, or two days after, the second decertification petition was submitted for filing.[84] This discharge order, which Franco overheard, comes very close to establishing direct evidence that Respondent intended to eliminate Clemente Fernandez from the Rios crew because of his position with the UFW.

Other testimony also generally establishes that it was Fernandez, personally, that the Company was seeking to eliminate from the Rios crew. Thus, Rios offered to assist both Salas and Jose Armando Fernandez in finding other work with the Company; Maria Valdez was re-employed by the Company the day after her "layoff" and was rehired in the Rios crew one month later; Maria Torres was eventually re-employed in the Rios crew in March, 1979. Clemente Fernandez and his wife, however, were never approached or offered an opportunity to return to work at the Company, even though Fernandez twice approached Rios seeking to return to work. And, according to the testimony of Jose Armando Fernandez, Rios informed him

[84] Franco recalled that the first day of the rapini harvest, the day on which he overheard Hernandez and Rios speaking, was December 6. Albert Studer, on the other hand, claimed the first day of the rapini harvest was December 8. Whether the conversation took place on December 6 or 8 does not appear material to the significance of it.

that he would not re-employ the father and mother because he (Rios) had had problems with them. Therefore, it appears that Clemente and Gregorio Fernandez's separation from their employment must be considered as discharges, and not as mere layoffs.[85]

The many circumstantial factors, such as the timing of the December "layoffs," the manner of selecting those to be laid off, which did not strictly adhere to the contractual concept of seniority, the fact that Clemente Fernandez was a prominent UFW supporter in a crew whose support against the UFW was statistically important, and the lack of a demonstratable economic justification for the layoffs, plus the direct evidence concerning Hernandez's order to Rios to discharge the crew's UFW representative, all are factors that lead me to conclude that Clemente and Gregorio Fernandez were discharged on December 12, under the guise of a layoff, in order to eliminate Clemente Fernandez from the Rios crew due to his position with the UFW and the support he could be expected to provide to it in the anticipated election. This conclusion is further buttressed by the fact that the Respondent manifested not only its animus against the UFW but its related, active effort to ensure success for the decertification effort.

It is more difficult, however, to reach the conclusion that Respondent unlawfully discharged or laid off Francisco Salas, Maria Torres, and Jose Armando. Salas and Torres had not opposed the decertification petitions as Clemente and Gregorio

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[85] During the course of his testimony at the hearing, Jose Rios suggested that work was available for the Fernandezes and Francisco Salas in the onion harvest then underway, although Rios had never mentioned such work to Clemente Fernandez in March, 1979, when Fernandez last approached him for work. As a result of Rios's suggestion at the hearing, Clemente, his wife, and Francisco Salas returned to work in the onion harvest, but when that harvest abruptly ended two or three days after their return so did their employment. Rios told Fernandez that the office had not informed him of any other work that they could perform. This brief return to work, some six months after their original "layoff" does not substantially undercut the notion that Clemente and Gregorio Fernandez were discharged and not simply laid off.

had consistently done, or as Jose Armando had done on the last two petitions. Nor were Salas and Torres members of the Fernandez family, a family connection which might have led to the expectation that they would follow Clemente's pro-UFW attitude. Nor does any evidence establish that Torres and Salas were UFW supporters. And it is difficult to understand just how the "layoff" of Salas and Torres might have been implemented to justify the Fernandez' layoffs, for the evidence fails to establish that their seniority required them to be laid off prior to or at the same time as the Fernandezes. Also, as earlier noted, Rios suggested where Salas might find other work at the Company, and three months later re-employed Maria Torres on his crew.

One perhaps can suspect that the Company determined to eliminate the group of employees it identified as associated with Clemente Fernandez, but at most it is a suspicion. Except for the fact that Salas and Torres rode to work with Clemente Fernandez, nothing else in the record reflects any significant nexus among the three of them.

A different matter exists with respect to Jose Armando, however, inasmuch as he was Clemente's son and another nonsupporter of the decertification effort. Although Rios also offered to assist Jose Armando in finding other employment with the Company, I have nonetheless concluded that it had been determined to eliminate Jose Armando from the Rios crew due to his close connection with Clemente Fernandez. The work Rios specifically suggested his willingness to help Jose Armando get was never definitely offered to him, and it is unclear whether it ever would have been.[86]

[86] It should be recalled that on December 16, at the Rios crew's party at La Coyote, Jose Armando rejected the prospect of working in the lettuce harvest as a piece-rate harvester, the job suggested by Rios. Whether he would have rejected other work at the Company is not established in the record, for Jose Armando also informed Rios that he had decided to work for another employer.

In sum, I have concluded that the Respondent violated Section 1153(c) of the Act by discharging Clemente, Gregorio, and Jose Armando Fernandez. This conclusion emerges from a preponderance of the evidence.

B. The Discipline of Rosa Briseno.

As earlier discussed, Rosa Briseno, a member of Pedro Palacio's crew, was barred from working two days and lost her seven years' seniority as a result of her having missed work for one day to attend UFW collective bargaining negotiations in her capacity as an alternate member of the UFW negotiating committee.[87] The Company has provided a twofold rationale for disciplining Briseno: first, because her absence for negotiations was not announced in writing in advance to the Company and, second, because the UFW later filed a grievance in her behalf seeking to restore her lost wages and the Company took that grievance to violate an understanding under which the Company allowed Briseno to return to work.

It is difficult to reach any conclusion other than that the Company discriminated against Briseno unlawfully, in violation of Section 1153(c) of the Act. Clearly, the Company treated Briseno's "unexcused" absence of one day for Union business in a distinctly different manner than it treated other unexcused absences. For one thing, as Ben Abatti testified, discipline was never issued by the Company for brief, unexcused absences. For another thing, as we observed in the case of Toribio Cruz and Manuel Castellanos, who absented themselves for weeks in order to engage in the decertification campaign, no discipline was issued for their unauthorized absences. Indeed, the Company has claimed in defense of its equanimity toward

[87] Briseno missed two days of work following the one day of negotiations because Jim House, the Company's labor relations representative, did not allow her to return to work on the day following the negotiations and then the Company did not provide notice for her to return on the second day until such time as it became impracticable for her to work that day. And, as a result of her missing so much work she also missed a third day's pay because of the Thanksgiving holiday.

Cruz's and Castellanos's extended absences that it was common among the steady workers to be absent from work without prior authorization or permission.

Thus, what we see is that when Briseno absented herself for one day without permission, to engage in UFW business, she was prevented from returning to work and eventually had her seniority eliminated, but when other workers absented themselves similarly without permission they received neither a warning nor discipline. "The essence of discrimination in violation of Section 1153(c)) is treating like cases differently." *Amalgamated Clothing Workers* v. *N.L.R.B.*, 95 LRRM 2821, 2826 (D.C. Cir. 1977). In the case of Rosa Briseno the Company did just that, treating Briseno differently than other like cases, based solely on the fact that her unauthorized absence related to the UFW.

No acceptable explanation emerges to warrant the Company's different treatment of Briseno. No sufficient rationale for that discriminatory treatment is supplied by the fact that the Company had been concerned over her past unauthorized absences, as the Company admitted to having no such concern over others who were similarly absent but for reasons having nothing to do with the UFW. Furthermore, the contractual provision that provided for absences when engaged in Union business was — in essence — no different than the contract provision providing for absences due to the other reasons.[88] Accordingly, no significant basis exists to distinguish the "unauthorized" absence of Rosa Briseno from that of other employees. If the Company's discipline of Briseno resulted from her having taken an unauthorized absence, clearly it was discriminatory and in violation of Section 1153(c) of the Act. *See Reichhold Chemicals, Inc.*, 187 NLRB 989 (1971); *Spotlight Co., Inc.*, 188 NLRB 774 (1971); *Amalgamated Clothing Workers, supra*, 95 LRRM at 2821.

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[88] It should be noted that the contract provision which provided for written requests for an absence to engage in Union business was not one which required such written requests to be made. Rather, the contract provision merely mandated the Company to grant such an absence when requested in advance in writing.

Nor can the Company justify its discriminatory treatment of Briseno by claiming that it eliminated her seniority only because the UFW filed a grievance in her behalf over her loss of wages. For "the right to file a grievance with one's collective bargaining representative over wages, hours, and working conditions has been a basic statutory right." *General Motors Corp.*, 232 NLRB 335 (1977); *Keokuk Gas Service Co.* v. *N.L.R.B.*, 98 LRRM 3332, 3335 (8th Cir. 1978). Both *General Motors* and *Keokuk Gas* demonstrate that it is unlawful for an employer to discipline an employee or increase discipline because he attempts to submit a grievance. Thus, when Jim House admitted to abrogating Briseno's seniority in response to the grievance filed in her behalf he essentially admitted violating the Act.[89]

III

RESPONDENT'S DISCONTINUANCE OF THE RAPINI CROP

A. Introduction and a Brief Review of the Law.

Two unfair labor practice allegations are put forward with respect to the rapini crop that was discontinued by the Respondent in 1978. Paragraph 14(e) of the complaint charges that the Respondent unilaterally terminated or subcontracted the growing and harvesting of rapini, without bargaining with the UFW regarding its decision, and thereby violated Sections 1153(a) and (3) of the Act. Paragraph 14(h) charges that the Respondent unilaterally terminated or subcontracted the growing and harvesting of rapini for the purpose of discouraging

[89] Although Mr. House claimed he retaliated against the UFW's grievance because he believed that the UFW had acted inconsistently with an "agreement" regarding Briseno's reinstatement, his testimony fails to establish or describe any agreement that was entered into between the UFW and the Company that constituted a waiver of Briseno's right to file a grievance. Moreover, House's explanation of why he decided to eliminate Briseno's seniority does not go to explain why he prevented her from working for two days following her one-day absence.

employees from exercising their voting rights in the decertification election, and thereby violated Sections 1153(a) and (c) of the Act. Although these two allegations are analytically distinct from one another under the Act and can be considered separately, under the circumstances of this case, particularly because of the Respondent's contractual defense to the refusal to bargain charge, it seems appropriate to consider the two allegations as related and interconnected.

As a preliminary matter in respect to the refusal to bargain charge, however, it should be noted that it is undisputed that the Company did not bargain with the UFW regarding its decision to discontinue the rapini crop, and that the General Counsel and the Company are essentially in dispute over whether a legal obligation existed on the Company's part to bargain over that decision. It is, therefore, appropriate to initially review a portion of the law surrounding collective bargaining, as it has developed under the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. Section 151, *et seq.*, which contains identical requirements as does our Act in Sections 1153(e) and 1155.2(a).[90]

In *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964), the United States Supreme Court held that when an employer's employees are represented by a collective bargaining agent, that employer must submit its decision to subcontract bargaining unit work to the process of collective bargaining. The court found that a decision to subcontract bargaining unit work could substantially impact the employees' "terms and conditions of employment," particularly when that decision will effectively terminate their employment, and by thus affecting the employees' "terms and conditions of employment" the

[90] It might be noted that Section 1148 of the Act requires the Board to "follow applicable precedents of the National Labor Relations Act. . . ." As will be seen in the discussion which follows, a uniformity of opinion does not exist under the National Labor Relations Act regarding certain features of collective bargaining that are pertinent to this case. Since the state of law under the National Labor Relations Act remains unsettled in this area, one must select which body of precedent is more appropriate to apply in this case.

decision to subcontract falls within those subjects that the NLRA, as does our Act, makes mandatory for bargaining. The court further noted that even when a decision such as to subcontract out bargaining unit work is motivated by economic considerations on the employer's part, it is a fitting subject for bargaining, as

> These (economic considerations regarding the cost of certain work functions) have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests.

The decision to subcontract that Fibreboard was held obligated to bargain over was a decision that replaced bargaining unit employees at Fibreboard's plant with those of an independent contractor, who was to perform the same work previously performed by the bargaining unit employees.

Other decisions then followed *Fibreboard* that deal with an employer's decision to close or terminate or relocate a portion of his business. With only a minor exception,[91] the National Labor Relations Board ("NLRB") has consistently held that such employer decisions must be submitted to the collective bargaining process before they are effectuated. *See Ozark Trailers, Inc.*, 161 NLRB 561 (1966); *Senco, Inc.*, 177 NLRB No. 102 (1969); *Royal Typewriter Co.*, 209 NLRB 1006 (1974), reversed in relevant part, 533 F.2d 1030, 1039 (8th Cir. 1976).[92] The NLRB's approach has been followed by

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[91] See *General Motors Corp.*, 191 NLRB No. 149 (1971), enforced, 470 F.2d 422 (D.C. Cir. 1972); *Summit Tooling Co.*, 195 NLRB 479 (1972).

[92] The court decision in *Royal Typewriter* suggests that an employer's decision to partially terminate bargaining unit work must only be submitted to collective bargaining where the decision is based on anti-union motives. This suggestion finds no basis in the law, however, for the statutory requirement to bargain collectively over such mandatory subjects as wages, hours, and terms and conditions of employment is a requirement having nothing to do with an employer's motivation regarding his employees' union. Other statutory provisions, such as our Act's Section 1153(c), restrict an employer from engaging in discriminatory acts because of anti-union motives.

certain federal courts, such as in *N.L.R.B.* v. *Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir. 1966), *cert. denied*, 385 U.S. 935, where the employer gave up certain work and commissioned an outside company to perform it off the employer's premises; and in *Weltronic Co.* v. *N.L.R.B.*, 419 F.2d 1120 (6th Cir. 1969), *cert. denied*, 398 U.S. 939, where the employer transferred unit work to another plant; but the NLRB's approach has been rejected by other federal courts, such as in *N.L.R.B.* v. *Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), where the employer discontinued a portion of his operations; in *N.L.R.B.* v. *Thompson Transport Co.*, 406 F.2d 698 (10th Cir. 1969), where the employer closed one of his transport terminals; and *N.L.R.B.* v. *Transmarine Corp.*, 380 F.2d 933 (9th Cir. 1967), where the employer moved his operations from one transport terminal to another.

The foregoing cases and the requirement to collectively bargain over partial business discontinuances or terminations are ably discussed and reviewed in *Brockway Motor Trucks* v. *N.L.R.B.*, 582 F.2d 720 (3d Cir. 1978). The Third Circuit in *Brockway* concluded its analysis of the existing state of law by rejecting the conflicting "*per se*" approaches raised before it — namely, that bargaining is never required when an employer decides to discontinue a portion of his bargaining unit operations if the decision is economically motivated, or that bargaining is always required when such partial closings or discontinuances are decided upon — and, instead, concluded that a more balanced approach to the question must be taken. The *Brockway* court determined that one must begin with the presumption that an employer who intends to close, terminate, or transfer a portion of work from a bargaining unit should submit that intention to the employees' bargaining agent for negotiation, inasmuch as that decision significantly affects the employees' terms and conditions of employment by decreasing or eliminating work opportunities within the bargaining unit. But, the *Brockway* court also held that when circumstances exist which demonstrate a severe economic necessity behind the

employer's decision, or which demonstrate some real exigency which makes bargaining impracticable or harmful to the employer's operations, then the employer is not obligated to submit his decision to the collective bargaining process. The *Brockway* court stressed that simply because the employer's decision to cease a portion of his business is economically motivated does not free him from his collective bargaining obligations. Rather, one must balance the rights and interests of both the employer and bargaining unit employees based on the existing factual circumstances.

B. A Factual Analysis With Respect to Paragraphs 14(3) and (h) of the Complaint

1. *The Refusal to Bargain Allegation.*

If one were to apply the general approach taken by either the Third Circuit in the *Brockway* case or that taken by the NLRB, which is even more supportive of employee collective bargaining rights, one would have to conclude that the Respondent was obligated to submit its decision to discontinue the rapini crop to the collective bargaining process. Nothing put forward by the Company in support of its economic rationale for discontinuing the rapini was so compelling as to make it necessary to act with such speedy or secretive disposition in discontinuing the crop as to make bargaining about the decision impracticable or unwieldly. In fact, the only economic support put forward for the Company's decision regarding rapini was Ben Abatti's conclusory assertion that the rapini market was not rewarding in the past year or two and that the Company made little or no profit during those years from rapini. No supporting data for that conclusion was offered by the Company. Furthermore, when the Company purportedly first decided to discontinue the rapini it was then engaged in collective bargaining with the UFW over the parties' first contract and some three to four months remained before the rapini planting would normally take place, thus providing a substantial opportunity and time in which to negotiate over the Company's decision. Nor

did the Company's decision to discontinue rapini involve a major change in capital formation or in business operations, which may have made bargaining over it more difficult or impracticable.

On the other hand, the decision to discontinue rapini quite obviously stood to have a substantial impact on bargaining unit employees (particularly if they did not follow the rapini to Studer's fields). Eliminating rapini would mean the layoff of some 130 to 140 workers for over a two-month period. No crop was grown to replace the rapini that would have employed a comparable number of the Company's employees. Thus, it was foreseeable that the Company's decision would lead to the substantial termination of employment for a sizeable group of the Company's year-round field workers. Indeed, the rapini crop was one of the Company's most labor-intensive crops.

One must keep in mind that the requirement to bargain over such a significant impact on members of the bargaining unit is not a requirement that will inevitably frustrate an employer's decision-making or flexibility. Our Act does not require that agreement be reached as to an employer's plan to discontinue a major crop, but only that the employer and union engage in good faith bargaining in order to see if through that bargaining process some reason can be found to either forego the discontinuance, ameliorate its impact on employees, or protect them against the consequences of it. If good faith bargaining is pursued without a satisfactory conclusion emerging, then the employer is free to implement his decision to discontinue a crop. But to wholly ignore the statutory mandate to engage in good faith negotiations over decisions that so significantly bear on the employees' terms and conditions of employment would be to nullify an important voice that our Act seeks to give workers in matters affecting their employment conditions, as well as frustrate the concept that by working together labor and management can resolve their conflicting

interests, hopefully to pursue jointly a direction by which both will benefit.[93]

The Company, in large part, seeks to justify its failure or refusal to bargain over the discontinuance of rapini by relying on its collective bargaining contract with the UFW. In particular, the Company cites the "management rights" clause, Article 16, which provided, *inter alia*, that "unless . . . limited by some other provision, of (the) agreement" that "the Company retains all rights . . . to determine the products to be produced, or the conduct of its business. . . ." The Company also refers to Article 38, which permitted the Company to continue the common practice of entering into various legal relations with others in regard to the growing, harvesting, and shipping of farm crops, and which precluded the UFW from interfering with or preventing any such agreements "with a grower and/or shipper for the growing, packing, harvesting or selling of a crop. . . ." Thus, the Company argues that its original decision to discontinue the rapini and its subsequent relationship with Albert Studer were sanctioned by the UFW contract and that it was not obligated to bargain about discontinuing the rapini crop.

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[93] It might be noted that even were we to give substantial weight to that precedential authority under the National Labor Relations Act that has held that an employer is not obligated to bargain over a decision to partially close or terminate its operations, these holdings are not wholly applicable to the facts in this case. Thus, *Adams Dairy, supra*, 350 F.2d 108, involved an employer who made a basic change in its capital structure; *Thompson Transport Co., supra*, 406 F.2d 698, involved an employer forced to close one of its terminals due to a substantial loss of business; *Transmarine Corp., supra*, 380 F.2d 933, similarly involved an employer compelled to close a part of his business operations due to the loss of substantial business and the need to regain that lost business by consolidating operation; and *N.L.R.B.* v. *Royal Plating and Polishing Co.*, 350 F.2d 191 (3d Cir. 1965), involved an employer compelled to partially terminate its business due to severe financial losses and a municipal government order that earmarked the employer's property for redevelopment. In other words, many — if not nearly all — of the court decisions which have refused to follow the National Labor Relations Board's approach to collective bargaining over partial closings or partial business discontinuance of its rapini crop.

Several considerations arise, however, that the Company's reliance on its contract with the UFW is misplaced. First, and perhaps foremost, is the fact that by Ben Abatti's own admission, supported likewise by the testimony of Jim House, the decision to discontinue rapini was made at least as early as April, 1978, before the UFW contract was entered into. Inasmuch as the decision to discontinue rapini was made not only before the contract was agreed to but while collective bargaining was in progress regarding that contract, it is difficult to see how the Company can now rely on contract language agreed to two or more months later to justify its rapini decision. The UFW was simply never advised of the Company's rapini decision and, therefore, could not have contemplated that it was waiving its rights to bargain over that decision.[94] Indeed, the contract clearly contemplates that the Company would grow rapini, as it provides for a rapini harvest piece-rate and for a rapini employees' seniority system.

Second, it is fair to conclude that the contract's management rights clause cannot be relied on to dispose of the refusal to bargain matter, since it was — under the circumstances present here — "limited by some other provision of the agreement. . . ." Thus, Article 37 of the parties' contract prohibits "subcontracting" when it is "to the detriment of the

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[94] If one concludes that the Company made its decision in April of 1978, as Ben Abbatti claimed, an issue may seem to arise as to whether that decision can be protested through an unfair labor practice charge filed more than six months later, as was the case herein. But the six-month limitation found in Section 116.2 of the Act is not a jurisdictional limitation; rather, it is a limit that must be raised as an affirmative defense. *Perry Farms, Inc.*, 4 ALRB No. 25 (1978) (Slip Opinion, p. 2, n. 1). The Respondent has not raised the six-month limit as a defense in this case and, accordingly, the limit cannot be relied on to bar a finding on the bargaining issue. In fact, the UFW had no knowledge of the Company's decision until December of 1978, when the harvest began and it became evident that Albert Studer was paying the harvest employees; until December no change in respect to the rapini was evident. The law is clear that the Act's six-month limitation period "does not begin to run until the aggrieved party knows, or reasonably should have known, of the illegal activity which is the basis for the charge." *Bruce Church, Inc.*, 5 ALRB No. 45 (1979) (Slip Opinion, p. 7).

Union or bargaining unit workers," permitting subcontracting only under certain limited circumstances that are not found in this case. If the Company's conduct in regard to rapini falls within Article 37, its conduct would then be prohibited by that provision and fall outside the management rights clause.

The Company denies that it engaged in subcontracting with respect to its rapini crop, distinguishing between its conduct and the conduct that existed in *Fibreboard Paper Products, supra,* 379 U.S. 203 (Co. Brief. p. 206); the Company claims that it did not bring in outside employees to perform work on Company premises as did the employer in *Fibreboard.* The court in *Fibreboard,* however, noted that the terms "contracting out" and "subcontracting" have no precise meaning and that "(t)hey are used to describe a variety of business arrangements altogether different from that involved in this case." A review of the facts in this case makes it clear that taken together the Company's decision to discontinue rapini and its contemporaneous agreement with Albert Studer fit comfortably within the concept of subcontracting, as prohibited by the parties' contract, surely more so than those arrangements fit the description of a grower-shipper relationship as is authorized by Article 38 of the contract.

No arms-length relationship existed between the Company and Albert Studer with respect to the Company's discontinuance of the rapini crop. Albert Studer, Ben Abatti's brother-in-law and full-time tractor foreman for the Company did not by happenstance dicide to grow rapini; rather as he admitted, his brother-in-law asked him if he wanted to take over the crop. Thereafter, much of the growing work in respect to the rapini was performed by the Company's tractor drivers and irrigators, while they were paid by the Company. Studer was not billed for the planting work until the crop was harvested, thus indicating that the Company helped finance the growing of "Studer's rapini." A written agreement was then entered into between the Company and Studer which provided the Company with shipping fees in respect to the rapini, fees that one experienced neutral observer described as "exhorbitant." The Company, through this agreement, was guaranteed a very substantial profit merely for selling and shipping

the rapini, a profit that could well equal or exceed the profit Studer could expect from growing the rapini. Finally, the rapini was harvested by entire crews that had been long employed by the Company, supervised by foremen who were normally Company employees. Indeed, the Company's general foreman, Mr. Hernandez, and its tractor foreman, Albert Studer, regularly visited the rapini harvest while it was underway even though they remained full-time Company employees.

Thus, except for the fact that Albert Studer paid the harvest workers and had his land used for the growing of rapini, the rapini was planted, irrigated, fertilized, and harvested by crews normally employed by the Company. The rapini was then sold in Company boxes which identified the Company as the grower and shipper. As far as the outside world knew the rapini was the Company's, not Studer's, just as it had been for the last 12 years. Irrespective of the language employed in their written contract,[95] the relationship between the Company and Studer was — in effect — one where the Company subcontracted with him to use his land for the rapini: the Company gave up growing rapini, a traditional crop, on its land; Studer's land was used instead; the growing and harvest of the rapini was generally performed and supervised by employees associated with the Company; and the Company was guaranteed a substantial rate of profit for continuing to ship the rapini under its name. Putting aside the rhetoric used to describe the facts in this case, an objective appraisal of them establishes a situation similar to an industrial manufacturer whose plant discontinues producing one of its products and, instead, contracts with another company to supply him that product to his specifications and under his brand-name, thus

[95] In its form and language the Company's written agreement with Studer was vastly different to written agreements entered into between the Company and other landowners regarding the packing and selling of farm crops, as is evidenced by several examples introduced by the General Counsel. The Studer agreement is also grossly exaggerated in its effort to portray Studer's sole ownership of the rapini. It is difficult to rely on the wording of that agreement in construing the reality of Studer's relationship with the Company.

continuing the product line but having eliminated his own employees from the manufacturing process. See *N.L.R.B.* v. *Winn-Dixie Stores, supra,* 361 F.2d 512.

Based on the foregoing analysis, it should be concluded that the Company's relationship with Studer fell within the contractually proscribed subcontracting and was not an arrangement permitted by the contract. The Company's contractual defense in respect to its rapini decision must be rejected. An additional issue arises with respect to the Company's contractual defense, an issue which inevitably leads to a consideration of Paragraph 14(h) of the complaint.

2. *The Discrimination Allegation.*

Article I(B) of the parties' contract also provided:

> The Company agrees that no business device, including joint ventures, partnerships or any other forms of agricultural business operations shall be used by the Company for the purpose of circumventing the obligations of this Collective Bargaining Agreement subject, however, to the provisions of Article 37, Subcontracting, and Article 38, Grower-Shipper Contracts.

Similarly, Article 38 provided that the Company will not "subvert the Union by entering into" grower-shipper agreements. Presumably, if the Company's decision to discontinue the rapini and transfer it to Albert Studer was intended to discriminate against bargaining unit members for anti-Union reasons, as is alleged in Paragraph 14(h) of the General Counsel's complaint, then such discrimination would likewise violate the contract provisions quoted above.

Several features in the record suggest that the Company's original decision to discontinue the rapini crop was motivated by its anti-Union animus. For one thing, the decision was in keeping with various threats made during the original campaign, which had ended with the UFW's certification. In that

campaign the Company had threatened to eliminate certain labor-intensive crops if the UFW became certified. *See Abatii Farms, supra*, 5 ALRB No. 34. For another thing, the Company made little or no effort to document its "economic rationale" for having discontinued the rapini. This missing evidence (which surely must have been available in terms of market reports or sales invoices) was also coupled with the shifting and self-contradictory testimony of Ben Abatti in respect to his reasons for not growing the rapini. As will be recalled, Mr. Abatti initially claimed that his growing decision was based solely on economic reasons, then later he testified to additional reasons for not growing it, then later he retracted these additional reasons. Additionally, there is the sworn declaration of Frank Preciado, a Company foreman, who had indicated to a Board agent that he was told by Studer that the Company was not growing rapini because of the Union.[96]

Nonetheless, other considerations exist that make it difficult to conclude that the Company's original decision to discontinue rapini was motivated by its anti-UFW animus. Preciado's declaration, while damaging on the surface, is somewhat ambiguous. The declaration's significance is also limited inasmuch as it only purports to describe a statement made to Preciado by Albert Studer, which Ben Abatti allegedly had made to Studer. As for the unlawful campaign threats made by the Respondent, they were made in late 1975 or early 1976, some two years before the rapini was discontinued. Thus, these unlawful threats were not closely related in time to the discontinuance of rapini. And, although one might suspect that

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[96] On January 21, 1980, the General Counsel moved to submit additional evidence by way of declarations or affidavits as to whether the Company grew rapini in the 1979-1980 season. The Respondent opposed the motion. At the hearing, Mr. Abatti claimed he did not know whether he would grow rapini in the 1979-1980 season.

The General Counsel's motion is denied. No compelling reason exists to warrant reopening the record in this case, when so much time has already passed since the hearing was held.

the Company sought to frustrate the UFW in its representation of employees in order to encourage a movement to decertify the UFW, by — among other things — discontinuing the rapini, no substantial evidence pushes one to reach this damaging conclusion. Furthermore, one cannot be very sure of what the Company originally intended in regard to "Studer's rapini." For example, the Company may have originally intended to serve Studer as a custom harvester, which would have resulted in no discriminatory impact on the rapini employees, as they would have remained Company employees during the harvest. In short, the evidence, I believe, is not sufficiently persuasive to infer that the Company originally discontinued its rapini violation of Section 1153(c).

On the other hand, the evidence is more persuasive that the Company engaged in discriminatory conduct when it came to the rapini harvest. The harvest, beginning in December, closely followed the Company's most recent efforts to frustrate the collective bargaining agreement. Basic provisions of that short-term agreement were not fulfilled by the Company, for no substantial reason. The harvest also began after the decertification campaign had been mounted. Inasmuch as the Company indicated consistently its strong support and backing for this decertification effort, it is reasonable to infer that the Company was interested in seeing that the decertification effort succeeded. One way to aid its success was to eliminate a large portion of field workers, whose support could not be counted on by the Company. This shuffling of potential voters could be particularly important in view of the beginning lettuce harvest which brought another large complement of field workers onto the Company's payroll as the decertification petitions were being qualified for an election. Thus, by eliminating approximately 130 employees from its payroll the Company could better hope for victory in the decertification election, basing its hope on the large complement of steady workers whose lack of enthusiasm for the UFW was readily known to Ben Abatti.

It is virtually impossible to accept the testimony of Ben Abatti and Albert Studer as to how the Company's employees ended up on Studer's payroll for the rapini harvest. Studer, despite years of farming, had never hired a large harvest crew before. Yet, Studer claimed he had made no final arrangements for a harvest crew with only a day or two to go before the harvest was to begin, when a failure to install a harvest crew could have resulted in substantial financial losses. Abatti claimed that Studer accepted his employees because they were being laid off due to a freeze, although neither the employees nor the foremen were aware of any such layoffs. Studer claimed he directly hired the Company's employees to save himself a labor contractor's overhead costs, yet he had overhead costs as high as those of a labor contractor. Abatti claimed that Studer personally employed the harvesters, although the Company had historically provided harvest assistance to other growers on a custom harvest basis, similar to the custom service it had provided in growing "Studer's rapini."

Once again a realistic appraisal of the facts belies the Company's contentions regarding them. In effect, the Company performed the harvest for Studer; it was the Company's crews, foremen, general foremen, and boxes that were used in the harvest, not Studer's, even though Studer superficially could claim himself as the employer by maintaining the payroll. But the evidence amply warrants the conclusion that it was the Company that maintained control over the harvest, not Studer, who knew nothing about harvesting the large and expensive crop.

3. ***Conclusions.***

In view of the foregoing analysis I conclude that the Company violated Section 1153(e) of the Act by refusing to bargain with the UFW about the discontinuance of rapini and that the Company violated Section 1153(c) of the Act by disenfranchising its rapini employees by having them temporarily placed on Albert Studer's payroll during the rapini harvest.

It is appropriate to conclude from the foregoing facts and analysis that the moving reason why the rapini employees were "hired" and paid directly by Albert Studer, and stricken from the Company's employment, was so the Company could remove them as possible voters in an upcoming decertification election.

CHALLENGED BALLOTS

A portion of this consolidated proceeding was concerned with the challenged ballots left unresolved by the Regional Director's report on challenged ballots, dated March 23, 1979. The findings set forth now with regard to these unresolved challenged ballots are offered in the event that the Board determines to honor the results of the decertification election conducted on December 27, 1978.

The challenged ballots cited in and left unresolved by the Regional Director's report fall into three categories: (1) a challenge was made to the ballot of Ray Veliz, Jr., based on the UFW's claim that Mr. Veliz was a supervisory employee; (2) a challenge was put forward as to 15 voters whose names, according to the Regional Director's report, did not appear on the eligibility list; and (3) a challenge was made with respect to 98 votes cast by workers in the rapini harvest. These challenges will be taken up in the aforestated order.

I

RAY VELIZ, JR.

Mr. Veliz, Jr., whose father is a foreman and supervisor with the Company, performs a number of different jobs for the Company. He drives an employee bus, he checks on the onion topping, he observes the melon picking to see that the picked fruit is acceptable, and he is a nailer in the lettuce harvest. The testimony put forward by the UFW with respect to Mr. Veliz,

Jr., fails to show that he performs, in any responsible manner, the functions set forth in Section 1140.4(j) of the Act, which defines supervisory employees. At most, Mr. Veliz, Jr., performs work at a slightly higher level of responsibility than that of a rank-and-file field worker, in that he reviews the onion and melon picking to ensure that workers are performing up to the Company's standards. In doing so, however, he does not perform or effectively recommend any of the functions which reflect supervisory employment. The supervisory challenge to Ray Veliz, Jr., should be overruled, as unsupported by the evidence.

II

FIFTEEN VOTERS NOT ON THE ELIGIBILITY LIST

Fifteen voters were challenged because their names appeared to be absent from the voter eligibility list. These voters were: Maurelio Rosales Chavez, Higino Arias, Dolores Velez, Sr., Santiago Valencia, Jose De La Cruz, Isidra Escobedo, Ignacio Medina, Manuel Lopez, Maria Luisa Escobedo, Felix Cantu Reyes, Atanacio Avina, Francisco Ortiz Rios, Ezequiel Zavala, Rafael Martinez Marquez, and Celia Ramirez Vasquez. At the hearing the Company and the UFW were able to stipulate to certain facts concerning these 15 voters, as noted below.

Four of the 15 challenged voters, Ignacio Medina, Manuel Lopez, Atanacio Avina, and Ezequiel Zavala, were — in fact — listed on the voter eligibility list, although their names were overlooked during the voting. No dispute exists as to their eligibility. Their votes, therefore, should be counted. Santiago Valencia's name also appears on the eligibility list, and the Company's earnings records indicate that he worked during the eligibility week of December 16. His vote also should be counted. Maurelio Chavez and Dolores Velez, Sr., are two voters whose names fail to appear on the eligibility list, but the Company's earnings records indicate that they were working

during the eligibility week of December 16. Inasmuch as the Company's earnings records indicate they were working during the eligibility week, I have concluded that their votes also should be counted. No valid reason has been brought forward to discount their votes, except for the apparent inadvertent error of having their names not placed on the eligibility list.

Of the remaining eight challenged ballots, the following should be noted. Pursuant to an understanding reached at the conclusion of the hearing with respect to submitting additional information concerning these eight voters, it was established by correspondence from a Board agent that Francisco Ortiz Rios, one of the eight, appeared on the eligibility list as Francisco Ortiz. This was determined by a check of Ortiz's social security number. Thus, Mr. Francisco Ortiz Rios was actually listed on the eligibility list; his vote should be counted.[97]

A final challenged ballot concerned Rafael Martinez Marquez. Mr. Martinez had worked in the Company's lettuce harvest the year before and also worked during the 1978-1979 harvest, but he did not appear at work until after the week of December 16 (used as the week for the eligibility list). According to Angel Carrillo, Martinez told him that he did not begin the harvest right away, prior to the week of December 16, because of illness. Martinez, of course, was not listed on the eligibility list. In view of the foregoing circumstances, I recommend that the challenge to his vote be sustained. The

[97] When the hearing closed the parties were given until July 11, 1979, to submit further information regarding the challenged voters (including Francisco Ortiz Rios) that either party wanted considered regarding their votes. Information was not submitted by either party with respect to Higino Arias, Jose De La Cruz, Isidra Escobedo, Maria Luisa Escobedo, Felix Cantu Reyes, or Celia Ramirez Vasquez. I recommend, therefore, that the challenges with regard to these six ballots be sustained.

evidence is not substantial enough to insure that Martinez's absence from work and from the eligibility list was — in fact — due to illness.[98]

III

THE 98 RAPINI EMPLOYEES

In view of my unfair labor practice findings, I have concluded that the ballots cast by workers in the rapini harvest should be counted, even though the workers were technically on Albert Studer's payroll during the eligibility week. One reason is because the Respondent unlawfully refused to bargain with the UFW regarding its discontinuance of the rapini. A second reason is because Respondent shifted its rapini employees to the payroll of Albert Studer in order to disenfranchise them as voters. A third, and more important, reason is because the facts generally demonstrate that the Company never relinquished real control over the rapini harvest and the work performed by the harvesters, and, even though the harvesters were technically treated as employees of Studer's, they actually remained under the Company's control. They continued to be supervised by foremen associated with the Company, and after the harvest they returned to their normal work at the Company, just as they had done in previous years.

CONCLUSIONS AND REMEDY

By way of general summary, I have concluded that the Respondent violated Sections 1153(a), (c), and (e) of the Act. The preponderance of evidence establishes that the Company provided significant assistance and support to the Petitioners' decertification campaign, so much so as to seriously interfere with its workers' protected rights under Section 1152 of the Act. The evidence further showed that this active, unlawful assistance by the Respondent occurred at the same time that the

[98] Pursuant to my request, certain information was reviewed by a Board agent, David Arizmendi, with respect to whether Mr. Martinez appeared on the Company's payroll following the week of December 16; the UFW's counsel, Carlos Alcala, also submitted correspondence after the hearing that dealt with Mr. Martinez and also with Mr. Francisco Ortiz Rios. For the sake of clarity, I have marked this correspondence as follows: ALO Exhibit 1 (Arizmende letter of July 5, 1979); ALO Exhibit 2 (Alcala letter of July 10, 1979), and ALO Exhibit 3 (Alcala letter of July 13, 1979). Neither the Petitioners nor the Company opposed the information contained in these letters which I have relied on in part in making my findings regarding Francisco Ortiz Rios.

Respondent was actively frustrating basic provisions of the UFW's collective bargaining agreement, demonstrating the Respondent's continuing animus against the UFW.

In addition, I have concluded that the Company unlawfully laid off or discharged Clemente Fernandez, Gregorio Fernandez, and Jose Armado Fernandez. As a related matter, I have concluded that the Company unlawfully suspended and then eliminated the seniority of Rosa Briseno, solely because of her Union activities. I have also concluded that the Company unlawfully refused to bargain with the UFW when it discontinued the rapini crop and unlawfully discriminated against the rapini employees by attempting to disenfranchise them from voting in the decertification election.

Finally, in view of the foregoing conclusions, it follows that the Company refused to bargain with the UFW, in violation of Section 1153(e) of the Act, when it refused to recognize and bargain with the UFW following the decertification election. Clearly, our Act does not permit an employer to refuse to recognize and bargain with his employees' certified bargaining representative based on the employer's purported good faith doubt of that representative's majority status, when that majority status has been undermined through the unlawful conduct of the employer. *N.L.R.B.* v. *Sky Wolf Sales, supra,* 470 F.2d at 263. Similarly, it was unlawful for the Company to have unilaterally altered its medical insurance plan (or any other terms and conditions of employment), after the Company had unlawfully refused to recognize and bargain with the UFW.

Having found that Respondent engaged in certain unfair labor practices within the meaning of Sections 1153(a), (c), and (e) of the Act, I recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the purposes of the Act, including the posting and distribution of the attached Notice to Employees. Having found that the Company unlawfully discharged or laid off three employees, unlawfully suspended one other and

eliminated her seniority, and unlawfully assisted and supported the Petitioners' decertification campaign, conduct which reflects a serious, broad-ranging violation of employee rights, I also recommend that the Company be ordered to cease and desist from infringing in any manner upon the rights guaranteed to employees by Section 1152 of the Act.

Several other features of my recommended remedy should be noted. First, because of the Respondent's unlawful support and assistance to the Petitioners' decertification campaign, the results of the decertification election should not be honored. One cannot fairly say that the election results sufficiently reflect the uncoerced and unrestrained free expression of the bargaining unit members. Second, although the General Counsel asks that the UFW's certification be extended for one year, no necessity appears to warrant this extension. By ordering the Respondent to recognize and bargain with the UFW, and by setting aside the results of the decertification election, the UFW is returned to its pre-existing position of being the certified bargaining representative. Finally, it seems appropriate to order that the Respondent grant the UFW's representatives access to the Respondent's work force in conformity with the provisions of its expired contract with the Company. This access will provide the UFW an opportunity to pursue their representation of employees while negotiations are under way for a new collective bargaining agreement.

Upon the basis of the entire record, the findings of fact, the conclusions of law and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Instigating, assisting, or supporting any effort to decertify the employees' certified bargaining representative.

(b) Discharging, laying off, suspending, eliminating the seniority of, or otherwise discriminating against employees in regard to their hire or tenure of employment, or in regard to any term or condition of employment, except as authorized by Section 1153(c) of the Act.

(c) Refusing to recognize and bargain in good faith with the UFW.

(d) Interfering with, restraining, or coercing in any other manner the right of employee to engage in protected activities.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer Clemente Fernandez, Gregorio Fernandez, and Jose Armando Fernandez full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges.

(b) Restore the full and complete seniority of Rosa Briseno.

(c) Make Clemente Fernandez, Gregorio Fernandez, Jose Armando Fernandez, and Rosa Briseno whole for any loss of pay and other economic losses each has incurred as the result of the discriminatory conduct of Respondent, together with interest thereon computed at the rate of 7% per annum. Back pay shall be computed in accordance with the formula established by the Board in *Sunnyside Nurseries, Inc.*, 3 ALRB No. 42 (1977).

(d) Recognize and bargain in good faith with the UFW as the employees' certified collective bargaining representative. Also, to make employees whole for any loss of pay or other economic losses any has incurred as a result of Respondent's refusal to bargain with the UFW, such refusal commencing from the time that the Respondent refused to recognize and bargain with the UFW and extending to such time as the Respondent commences to bargain with the UFW in good faith.

(e) To permit UFW representatives to take access to its properties in accordance with the expired contract, until such time as a new collective bargaining agreement is entered into or until the parties bargain to impasse.

(f) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination by the Regional Director of the back pay period and the amount of back pay due under the terms of this Order.

(g) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriate languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth hereinafter.

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time between November 28, 1978, and the time such Notice is mailed, and thereafter distribute copies to all employees hired by Respondent during its next peak season.

(i) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous places on its property, the time(s) and place(s) of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees assembled on Company time and property, at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the

Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(k) Notify the Regional Director, in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: March 23, 1980

AGRICULTURAL LABOR RELATIONS BOARD

By_____

David C. Nevins
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing in which each side had a chance to present evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act by discriminating against employees; by interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 1152 of the Agricultural Labor Relations Act, primarily because we assisted and supported an effort to decertify the UFW; and by refusing to recognize and bargain with the UFW when they still represented the employees. We have been ordered to notify you that we will respect your rights in the future. We are advising each of you that we will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

2. To form, join, or help unions;

3. To bargain as a group and choose whom they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect one another;

5. To decide not to do any of these things.

Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing any of the things listed above.

WE WILL NOT discharge, lay off, eliminate a worker's seniority, or otherwise discriminate against employees with respect to their hire or tenure of employment because of their involvement in activities protected by law.

WE WILL OFFER Clemente Fernandez, Gregorio Fernandez, and Jose Armando Fernandez their old jobs back and we will pay each of them any money they lost because we discharged them. WE WILL ALSO reimburse Rosa Briseno and restore her seniority.

WE WILL RECOGNIZE AND BARGAIN with the UFW as your certified collective bargaining representative.

DATED:

ABATTI FARMS AND
ABATTI PRODUCE

By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE OF THE AGRICULTURAL LABOR RELATIONS BOARD, AN AGENCY OF THE STATE OF CALIFORNIA. DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within entitled action. My business address is: 915 Capitol Mall, 3rd Floor, Sacramento, CA 95814.

On October 28, 1981 I served the within Decision 7 ALRB 36 Abatti Farms, Inc. and Abatti Produce, Inc., 78-RD-2-E/78-CE-53-E, et al., on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

CERTIFIED MAIL

Thomas Nassif, Esq.
Gray, Cary, Ames & Frye
P.O. Box 2416
El Centro, CA 92244

Best, Best & Krieger
600 East Tahquitz—
McCallum Way
Suite C
Palm Springs, CA 92262

Gray, Cary, Ames & Frye
2100 Union Bank Building
San Diego, CA 92101

United Farm Workers
Legal Office
P.O. Box 30
Keene, CA 93531

REGULAR MAIL

El Centro ALRB Regional Office
319 Waterman Avenue
El Centro, CA 92243

REGULAR MAIL

Mr. Ben Abatti
P.O. Box 466
El Centro, CA 92243

Abatti Farms/Produce
184 Commercial Avenue
El Centro, CA 92243

United Farm Workers
P.O. Box 1940
Calexico, CA 92231

Toribio Cruz
Mar Del Corral #105
Colonia Anahuac, Mexicali B.C.
Mexico

Jose Donate
P.O. Box 130
Heber, CA 92249

2 copies hand delivered to
General Counsel

Executed on October 28, 1981 at Sacramento, California. I certify (or declare), under penalty of perjury that the foregoing is true and correct.

Esther M. Torres
Secretary to the Board

APPENDIX B

4th Civil No.
26468

IN THE COURT OF APPEAL
OF THE

State of California

FOURTH APPELLATE DISTRICT

DIVISION ONE

ABATTI FARMS, INC. and ABATTI PRODUCE, INC.,
Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Real Party in Interest.

APPEAL FROM THE ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD

PETITIONER'S OPENING BRIEF

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4th Civil No.
26468

IN THE COURT OF APPEAL
OF THE

State of California

FOURTH APPELLATE DISTRICT

DIVISION ONE

ABATTI FARMS, INC. and ABATTI PRODUCE, INC.,

Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Real Party in Interest.

APPEAL FROM THE ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD

PETITIONER'S OPENING BRIEF

I
STATEMENT OF THE CASE

This case involves an election conducted at ABATTI FARMS, INC. and ABATTI PRODUCE, INC. (hereinafter "ABATTI") on December 27, 1978. The workers voted to decertify the UNITED FARM WORKERS OF AMERICA, AFL-CIO (hereinafter "UFW") as their bargaining representative. Subsequent to the election, unfair labor practice charges were filed against ABATTI by the AGRICULTURAL LABOR RELATIONS BOARD (hereinafter "ALRB") for allegedly engaging in illegal conduct in conjunction with the election.

In a consolidated proceeding involving unfair labor practice charges, election objections and challenged ballots, Administrative Law Officer David Nevins overturned the election. Nevins found that ABATTI had interfered with the workers' organizational rights set forth in Section 1152 of the Agricultural Labor Relations Act (hereinafter "the Act").

The ALRB affirmed with slight modification the ALO's findings in a decision rendered on October 28, 1981. Specifically, it held that ABATTI had unlawfully supported the decertification drive, laid off union supporters, and refused to bargain over the decision to discontinue a crop.

A petition for review of the Board decision was timely filed by ABATTI with this Court. The petition was granted and this appeal followed.

II
STATEMENT OF THE FACTS

The facts in this case are both complicated and disputed. The record contains 29 volumes of transcript. A summary of the entire record is provided in Petitioner's earlier exceptions

brief. A short description of the relevant facts is set forth below. Relevant portions of the record will also be cited in discussing the specific charges at issue.

Petitioners harvest and market agricultural produce. On November 18, 1977, the UFW was certified by the Board as the collective bargaining representative of ABATTI employees. The UFW and ABATTI signed their first Collective Bargaining Agreement on June 7, 1978. The Agreement's expiration date was November 18, 1978. Notwithstanding the contract, dissatisfaction with the Union soon surfaced among the ABATTI workers.[1] The most common complaint involved a general dissatisfaction with union medical benefits.[2]

A. The Decertification Petitions

The move toward decertification started through the efforts of two employees. Manuel Castellano was an irrigator with ABATTI. Toribio Cruz was a tractor driver. Both workers were long-term employees of the Petitioners. Castellano was terminated by ABATTI for his refusal to join the UFW as required by the Collective Bargaining Agreement. (*See* R.T. Vol. VI, p. 114, 11. 24-27.) Cruz joined the decertification effort because he had become unhappy with the Union and its medical plan. (R.T. Vol. V, p. 13, 11. 4-8.) Castellano and Cruz began circulating petitions signed by ABATTI workers in November, 1978. The first petition was collected on a yellow pad of paper. When the workers presented the signatures to the ALRB, they were told that the petition was invalid since the proper state forms had not been used. (R.T. Vol. XXIII, p. 120, 11. 4-20.) Castellano and Cruz then collected signatures on the forms provided by the ALRB. The Board again refused

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[1] One worker testified that the Union had shot up his house and threatened his family and that "90% of the people did not want the union." (R.T. Vol. V, p. 82, l. 9-p. 83, l. 3.)

[2] *See* testimony of Marcos Diaz Vicente (R.T. Vol. XXIII, pp. 81-93); Ben Abatti (R.T. Vol. XXI, p. 57, l. 4-p. 58, l. 13); Roberto Tafoya (R.T. Vol. XXV, p. 124, l. 26-p. 127, l. 5); Severino Piceno (R.T. Vol. XXIII, p. 124, l. 26-p. 127, l. 5).

to accept the signatures. It was not until the attorney for Castellano and Cruz, Tom Slovak, aided in procuring a third set of signatures that the decertification election was ordered.[3]

B. Benefits Allegedly Provided to Cruz and Castellano

Neither Cruz nor Castellano worked for ABATTI during the decertification campaign. Castellano was terminated in November, 1978 for refusing to join the Union. (R.T. Vol. VI, p. 102, ll. 1-9.) Cruz took an informal leave of absence from ABATTI. This was apparently a common practice among long-term employees when work was slow.[4] Work was generally slow for tractor drivers during the time that Cruz collected the signatures. (R.T. Vol. IV, p. 103, l. 29; p. 104, l. 23.)

1. *Medical Benefits for Employees.* Upon the expiration of the UFW Collective Bargaining Agreement in January, 1979, ABATTI instituted its own medical insurance plan. The Company's intention to implement the plan was discussed with the Union prior to its initiation. (R.T. Vol. XXI, p. 209, l. 24-p. 210, l. 12.) The Company wanted to ensure that its employees were going to be covered by some insurance after the contract expired. (*See* G.C. Trial Exhibit 51; R.T. Vol. XXI, p. 210, ll. 8-28.) ABATTI was also concerned that many of its workers were not eligible under the Union plan. (R.T. Vol. XXI, p. 57, l. 4; p. 58, l. 13.)

Cruz and Castellano were listed on the eligibility list of the new plan despite the fact that they had not technically worked a sufficient number of hours to qualify. It was not unusual for the Company to place a long-term worker on the eligibility list notwithstanding a deficiency of hours. (R.T. Vol. XXI, p. 66, l. 8-p. 67, l. 27.) Cruz and Castellano, however, benefitted only

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[3] It should be noted that none of the alleged violations involving access or threats relied upon by the Board occurred with respect to signatures gathered on the third and controlling petition.

[4] *See* testimony of employees Robles (R.T. Vol. XXVII, pp. 65-67); Hernandez (R.T. Vol. XXVII, pp. 68-73); Nevarro (R.T. Vol. XXVII, pp. 75-89); *see also* testimony of T. Cruz (R.T. Vol. IV, pp. 104-105).

minimally from their inclusion on the list. Castellano received no medical benefits. Cruz had submitted $84.00 in health insurance claims at the time of the hearing. (R.T. Vol. XXVI, p. 166, 11. 5-12.)

2. *Pay Advances and Loans.* Pay advances were given to Castellano in January and February of 1979. Cruz received a Christmas bonus on December 23, 1978. It was a common practice for ABATTI to give its employees advances and bonuses similar to those received by Castellano and Cruz.[5]

It was also common for ABATTI employees to charge repairs at a local glass company to the Petitioners' account. (R.T. Vol. XXV, pp. 56-65.) On one occasion, Cruz charged the repair of a broken windshield which he believed was shot out by UFW supporters. (R.T. Vol. IV, p. 116, l. 22-p. 119, l. 20; Vol. XXIX, p. 43, l. 10-p. 44, l. 4.) The Company allowed Cruz to repay the amount through deductions from his checks. (R.T. Vol. IV, p. 119, l. 19-p. 121, l. 6.)

3. *Petitioners' Selection of an Attorney.* Cruz, Castellano and the other ABATTI workers engaged in the decertification drive were aided by attorney Tom Slovak.

After Cruz' second decertification petition had been dismissed by the ALRB he asked an employer representative, Jim House, whether the Company could assist him in an appeal. House contacted the Petitioners' attorney, Scott Wilson. Wilson met with Cruz and explained that his firm could not represent the workers. At the request of Cruz, Wilson contacted attorney Tom Slovak of Best, Best & Krieger in Palm Springs. Slovak went to El Centro after receiving assurances that the Company had not instigated the petition. (R.T. Vol. XIV, pp. 12-26; pp. 40-51.) A meeting was arranged between Slovak and Cruz. After meeting with Cruz, Slovak decided to accept the case on a *pro bono* basis. (R.T. Vol. XIV, pp. 59-64.) Although Slovak

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[5] *See* ABATTI Trial Exhibits 13 and 14. (R.T. Vol. XXVI, pp. 151-162.) For example, irrigator Jesus Miranda testified that he had borrowed up to $500.00 from ABATTI at one time and that he owed as much as $2,300.00 in total. (R.T. Vol. XXVIII, pp. 2-3.)

initially contemplated only filing an appeal from the decertification petition's dismissal, he soon became involved in a full-scale decertification effort.

Slovak used the library of Byrd, Sturdevent, Nassif & Pinney since it contained the only labor materials in the Imperial Valley, with the exception of the ALRB. All clerical and phone costs incident to using the library were paid by Best, Best & Krieger. (R.T. Vol. XIV, p. 56, l. 11-p. 57, l. 2; p. 144, l. 14-p. 146, l. 25.) Distrustful of Slovak's claim that he had no involvement in the matter prior to December 13, 1978, the Board subpoenaed the telephone records of Slovak, the law firm of Byrd, Sturdevant, Nassif & Pinney (Petitioners' attorneys), ABATTI FARMS, INC. and the personal residence of Ben Abatti. The records failed to reveal any telephone conversations or any other involvement of Slovak prior to December 13, 1978. (*See* testimony of Cruz and Slovak, R.T. Vol. IV, pp. 146-204; R.T. Vol. XIV, pp. 5-164.)

4. *Alleged Aid in Procuring Signatures.* The alleged involvement of Jose Rios, an ABATTI foreman, in the workers' decertification effort was disputed at the hearing. Rios was involved in a shooting incident with a UFW supporter in May, 1979. The incident occurred nearly six months after the decertification election at issue and was unrelated to it.

With regard to the election, Rios attended an annual Christmas party given by the workers where signatures for the decertification petition were gathered by Eva Donate and Tom Slovak. (R.T. Vol. XVII, p. 18, l. 15-p. 19, l. 19.) It was never alleged that Rios collected signatures. (R.T. Vol. XVII, p. 18, 11. 15-18; p. 70, 11. 1-6.)

Rios also gave two ABATTI workers who were collecting signatures for the decertification campaign a ride in his car. UFW supporters whose signatures were sought, testified that they were intimidated by Rios. In one of the alleged incidents, the worker whose signature was requested testified that Rios was barely visible from the car and never spoke to her. (R.T.

Vol. XXIX, p. 3, l. 12-p. 4, l. 27.) With respect to the other incident, Rios allegedly gave the witness a dirty look. (*See* R.T. Vol. XI, p. 19, 11. 16-28.)

C. Access Violations

During November and early December, Cruz collected signatures from ABATTI employees working in the fields. ABATTI did not have a no solicitation rule in effect at that time. Irreconciliable testimony was given regarding whether the signatures were gathered during working hours as opposed to break or lunchtime.

It is clear that Cruz visited the crew of Angel Avina. General Counsel's witness testified that Avina spoke briefly with Cruz and told him that he could speak with the workers during their lunch hour. (R.T. Vol. XI, p. 37, 11. 3-24.) Cruz spoke with several employees as they came out of the fields during a break. After speaking with Avina, Cruz left the field and did not return. (*See* R.T. Vol. XI, p. 38, 11. 6-20.)

Cruz also spoke to members of Avina's crew when the foreman was not present. Cruz would generally visit the crew during lunchtime. In addition, Cruz spoke to workers when the melon picking machine was being turned around at the end of a row. The process usually takes between 10 and 12 minutes to complete. (R.T. Vol. XXIV, p. 51, 11. 22-27.) During this time, the workers would normally take a short break to get a drink of water or use the restroom facilities. (R.T. Vol. XXIV, p. 98, 11. 8-12.) Witnesses for General Counsel testified that Manuel Gabino and Trinadad Soto ordered the machines shut down on several occasions to allow the workers to listen to Cruz.[6] Witnesses for Petitioners indicated that the crew's normal schedule was not adjusted to accommodate Cruz and that Cruz spoke with the crew for only the amount of time it took to turn the machine around.[7]

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[6] *See* testimony of UFW crew representative, Guadalupe Covarrubias and her husband, Tadeo. (R.T. Vol. VII, p. 78, l. 27-p. 79, l. 14; R.T. Vol. VIII, pp. 2-12.)

[7] *See* testimony of Maria Escobedo (R.T. Vol. XXVII, p. 38, l. 28-p. 39, l. 28); Avina (R.T. Vol. XXIV, p. 5, 11. 14-26); Soto (R.T. Vol. XXVII, p. 29, 11. 1-28).

The fact that the UFW was granted access to ABATTI's fields during working hours was also addressed at the hearing. UFW representatives regularly entered the fields during working hours in the month of December. (R.T. Vol. XXIII, p. 32, l. 22-p. 33, l. 3.) A number of witnesses attested to the fact that the UFW would visit the Petitioners' workers to gain support for the Union in the upcoming decertification election.[8] ABATTI foremen granted the Union access whether or not permission to enter the fields was requested. (R.T. Vol. V, p. 179, l. 15-p. 181, l. 11.)

Witnesses for the Union testified that UFW representatives visited the fields not to solicit support for the election but rather to persuade the workers to sign a new contract. (R.T. Vol. XXIII, p. 57, l. 1-p. 58, l. 25; R.T. Vol. XXVIII, p. 59, l. 24-p. 59, l. 14.)

D. Discriminatory Acts Against UFW Supporters Allegedly Committed by ABATTI.

1. *Discontinuation of the Rappini Crop.* As early as April, 1978, Ben Abatti considered discontinuing his rappini crop. (R.T. Vol. II, p. 31, ll. 5-6.) Rappini is a broccoli-type of vegetable. The market price fluctuates greatly from year to year. (R.T. Vol. II, pp. 18-23.) Because of the crop's risky nature, most farmers in the Imperial Valley do not plant it.[9] ABATTI had lost money on its rappini crop in recent years. (R.T. Vol. II, p. 23, ll. 2-4; Vol. XXI, p. 51, ll. 15-22.) ABATTI felt that the increased acreage in other crops would be a safer and more stable investment. Given the recent history of strikes in the Imperial Valley and the fact that the collective bargaining agreements of major growers in the Imperial Valley

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[8] *See* testimony of Palacio (UFW representatives overheard discussing insurance, better treatment and better wages). (R.T. Vol. XXIV, p. 9, l. 9—p. 10, l. 20.) Vicenta Orta (Union representatives would encourage workers to support the Union and ask for votes in the upcoming election). (R.T. Vol. XXIII, p. 48, l. 26-p. 49, l. 21.)

[9] Abatti testified that the only remaining growers of the crop were Albert Studer and D'Arrigo Brothers. (R.T. Vol. II, p. 23, ll. 14-22.)

would expire at the same time, ABATTI was also concerned about a strike in the middle of the rappini harvest. (R.T. Vol. XXI, pp. 45-55; p. 49, l. 27-p. 51, l. 23.)

Notwithstanding the crop's high-risk nature, Albert Studer, Abatti's brother-in-law, was interested in growing rappini. (R.T. Vol. II, p. 27, l. 25-p. 28, l. 1.) He was enticed by the potential for high profits. Studer was employed as a full-time foreman for Petitioners. Ben Abatti testified that it was not unusual for persons in such a position to have independent farming operations.[10] As a small operator, however, Studer lacked the packing and marketing capabilities of the Petitioners. Accordingly, in September of 1978, Studer and Abatti entered into an agreement whereby Studer would grow the rappini and ABATTI would pack, ship and market the crop. (*See* G.C. Trial Exhibit 2.) The agreed upon price for this arrangement was $2.75 per carton. (*Id*) Studer completely financed the operation without aid from ABATTI. (*See* R.T. Vol. II, p. 29, ll. 14-16; Vol. XIV, pp. 196-207.) ABATTI did provide custom tractor work to prepare the field for planting. (R.T. Vol. II, p. 32, l. 14-p. 35, l. 7.) This work was paid for by Studer. (*Id*)

With regard to the harvesting of the rappini, Studer had originally planned to hire an independent contractor to arrange for the necessary labor. (R.T. Vol. XIV, p. 213, 11. 7-12.) However, in December, 1978, a freeze in the Imperial Valley cut short ABATTI's melon harvest. (R.T. Vol. II, p. 53, l. 21-p. 54, l. 4; Vol. XIV, p. 213, 11. 7-24.) Studer hired the employees laid off by ABATTI for lack of work. The workers in these crews were hired and paid directly by Studer. (R.T. Vol. II, p. 59, 11. 14-27.) No contract existed between ABATTI and Studer with respect to their employment. (*Id*)

To attack the viability of the ABATTI/Studer packing arrangement, General Counsel called Howard Hall to testify.

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[10] Studer himself owns 400 acres. He leases two hundred of the acres to other farmers. He farms the remaining acreage himself. (R.T. Vol. XIV, p. 182, 11. 12-21.)

Hall's testimony implied that the price charged by ABATTI for shipping and packing the rappini was exorbitant. (R.T. Vol. XIX, p. 9, 11. 10-24.)[11] Hall's total experience with rappini stemmed from an experimental government-funded program where approximately one acre, or 300 cartons, was involved. (R.T. Vol. XIX, pp. 14-39.) The rappini in this program was not hydrocooled and there is no evidence that it was shipped to eastern markets.[12] Moreover, Hall was aware of no packer in the Imperial Valley that had an operation similar to his. (R.T. Vol. XIX, p. 14, 11. 2-24.)

E. Fernandez Group Layoff

In December, 1978, Supervisor Jose Rios laid off six employees. A number of crew members testified that very little work was available during the month of December and that the entire crew was forced to cut back on the number of hours worked.[13] In previous years, the typical response to such a situation was to cut back five to six employees until additional work again became available. (R.T. Vol. V, p. 186, l. 14-p. 187, l. 22.) 1978 was no exception. At the direction of the general manager, Rios laid off five employees on the basis of seniority. (R.T. Vol. V, p. 193, l. 24-p. 194, l. 2.) One of the employees was the UFW crew representative, Clemente Fernandez. (R.T. Vol. V, p. 195, 11. 6-13.) Rios made the layoffs on the basis of his understanding of the crew members' seniority status. After the layoffs, Rios went to the ABATTI personnel office to confirm his understanding of the proper seniority order. (R.T. Vol. V, p. 206, 11. 1-19.) Rios was informed by the office that Maria Valdez had less seniority than Fernandez and the others and would have to be laid off also. She was laid off the following day. (R.T. Vol. V, p. 199, 11. 10-

[11] On the basis of figures prepared by his accountant, Ben Abatti testified that his costs were $2.40 per carton. The contract price with Studer was $2.75. (R.T. Vol. XXI, p. 29, l. 10-p. 31, l. 17; G.C. Exhibit 2.)

[12] In contrast, ABATTI utilized hydrocooling and shipped the product nationwide. (R.T. Vol. XXI, p. 26, l. 8-p. 27, l. 14.)

[13] See testimony of Adelina Moreno (R.T. Vol. XXII, p. 68); Eva Donate (R.T. Vol. XXIV, pp. 120-121); Jose Rios (R.T. Vol. VI, pp. 83-88).

27.) The layoffs were made pursuant to a seniority list prepared by the office since the Union had failed to supply a list despite the fact that the Collective Bargaining Agreement required it to do so. (*See* G.C. Trial Exhibit 10.)[14]

Conflicting testimony was given regarding an alleged conversation between Rios and Ray Hernandez, the general foreman, approximately one week before the layoffs. When called by General Counsel, Fernando Franco testified that one day while looking for work he overheard Hernandez instruct Rios to "fire him" and "I don't want any representative from the union to be talking with the people." (R.T. Vol. XI, pp. 25-26.) Both Rios and Hernandez deny that such a conversation took place. (R.T. Vol. XXII, p. 114, l. 25-p. 118, l. 20.)

F. Discipline of Rosa Briseno

Rosa Briseno was the UFW representative for foreman Palacio's crew. Briseno had a history of failing to report for work. (R.T. Vol. XIII, p. 52, l. 16-p. 54, l. 22.) On the morning of November 27, 1978, Briseno did not work because of her attendance at an industry-wide negotiation session as a UFW representative. The Petitioners were not involved in these negotiations. Prior to leaving, Briseno did not receive a leave of absence from ABATTI.[15]

Upon learning of Briseno's action, ABATTI representative Jim House told foreman Palacio that Briseno should not return to work until the absence problem was straightened out. (R.T. Vol. XXVI, p. 42, 11. 8-28.) House was apparently upset with the frequency and unpredictability of Briseno's absences. House contacted ABATTI's attorney, Tom Nassif, and was

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[14] General Counsel Trial Exhibits 42 and 59 substantiate the fact that Clemente and the others were laid off in seniority order. Seniority was computed on the basis of time that the employee had worked for ABATTI. Leaving the crew of Rios to work in another crew did not amount to a break in seniority. Thus, Eva Donate, Adelina Moreno and Salas did not lose their seniority status because they had worked in other crews.

[15] Rosa Briseno did inform her foreman on the morning of her absence that she was not going to work that day. (R.T. Vol. XIII, p. 15, 11. 16-19.)

advised that Briseno should be permitted to come back to work, but not paid for the time she was absent. (R.T. Vol. XXVI, p. 45, l. 20-p. 26, l. 6.) This proposal was rejected by the Union. It was only after the Union protested the refusal of the Company to pay Briseno back wages that House adjusted her seniority date with the Company to the date she returned to work. This was done to strengthen the Company's bargaining position. (*See* testimony of House, Vol. XXVI, pp. 48-60.) House stated that if the matter had been submitted to arbitration as contemplated by the collective bargaining agreement, it was his position that Briseno would retain her original seniority but receive no backpay for the days she did not work. (R.T. Vol. XXVI, p. 50, ll. 21-23.)

G. Christmas Party at La Coyota

For a number of years the workers at ABATTI had thrown an annual Christmas party. In December, 1978, the workers gathered at La Coyota, a restaurant frequented by members of the crew. General Counsel's witnesses testified that several supervisors were present at the meeting. (R.T. Vol. XVII, p. 16, l. 3-p. 17, l. 2.) None of the supervisors were observed collecting signatures. Signatures to support the decertification drive were collected by worker Eva Donate (R.T. Vol. XXIV, p. 123, ll. 3-22) and attorney Tom Slovak. (R.T. Vol. XVII, p. 18, ll. 15-16.)

III
ARGUMENT

A. In Refusing to Recognize the Workers' Rejection of the UFW, the Board Failed to Adhere to its own Standards Regarding the Overturning of an Election.

The Agricultural Labor Relations Act (hereinafter "ALRA") was enacted to protect the rights of agricultural employees with respect to the selection or rejection of a bargaining representative. It was clearly not created to serve the vested interest of either employers or unions. In its preamble at Section 1, the ALRA provides in pertinent part that its goal is: "[T]o insure peace in the agricultural field by guaranteeing justice for agricultural workers and stability in labor relations."

California Code Section 1140.2, echos such a sentiment by noting that:

> "[T]he policy of the State of California is to encourage and protect the rights of agricultural employees to full freedom of association, self-organization and designation of representatives of their own choosing . . . ."

In the relatively short history of the ALRA, it is only natural that the initial questions facing the Board were those concerning representation elections and unfair labor practices committed during union organizational campaigns. Few Board cases to date have addressed election objections in the context of a decertification election. Nevertheless, it is inevitable in the development of labor relations that labor unions must accept decertifications just as employers must accept certifications. The history of the National Labor Relations Act (hereinafter "NLRA") indicates that despite an increasing number of successful decertification elections, labor unions continue to exist and prosper on a national scale.

It is generally recognized that the NLRB applies similar standards to certification and decertification elections. *See Colonial Hardware Flooring Company, Inc.* (1948) 76 NLRB 1039, 21 LRRM 1241; *Soule Steel Co.*, 1961 CCH 10,602; *S. B. Cattrell & Sons Co.* (1949) 87 NLRB 1. Given the ALRB statutory directive to adhere to NLRB precedent, it would seem that the Board would apply the same rules to decertification elections that govern a representation vote. The ALRB has failed to live up to such an expectation in the instant case.

From its earliest days, the ALRB has focused on the "unique characteristics of the agricultural worker" to uphold the results of a representation election notwithstanding misconduct on the part of the Union.[16] In *Samuel F. Vener Co.* (1975) 1 ALRB No. 10, the Board rejected the NLRB "laboratory conditions" test used to determine the legitimacy of an election. In reaching its conclusion, the ALRB held that:

> " . . . the typically seasonal and often transitory nature of that employment makes repetition of the experiment difficult, particularly if the harvest season in which the original election was conducted is over by the time the election is reviewed. Setting an election aside in the context of agricultural employment thus carries implications beyond those involved in the normal industrial situation." *Id* at 3.

A similar conclusion was reached in *D'Arrigo Brothers* (1977) 3 ALRB No. 37. There the UFW was charged with numerous acts of misconduct in conjunction with a representation election. Notwithstanding allegations of threats and illegal

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[16] *See Patterson Farms, Inc.* (1976) 2 ALRB No. 59 (economic and physical threats by union insufficient to overturn election results; uncorroborated hearsay evidence does not constitute substantial evidence to support a finding of the Board); *Sam Andrews' Sons* (1978) 4 ALRB No. 59 (access violations insufficient to overturn election); *Ranch No. 1, Inc.* (1979) 5 ALRB No. 1 (threats and access violations by the union insufficient to overturn election); *Borchard Farms* (1976) 2 ALRB No. 16 (numerous access violations insufficient to overturn election).

campaigning, the Board certified the Union over objections from the employer. In justifying its decision, the Board set forth the following rationale:

> "When the NLRB decides to overturn an election and conduct a rerun of the 'experiment,' the rerun election can usually be held as soon as the determination to set the first election aside is made and can be held among substantially the same electorate. In the agricultural labor context, rerun elections, if they are to have the same standards of employee participation as the initial election, generally cannot be conducted until the next peak of employment which may be the next harvest season, a year after the first election. Furthermore, the electorate will likely be substantially changed. Thus, our decision to set aside an election in the agricultural context means that the employees will suffer a serious delay in realizing their statutory right to collective bargaining representation if they choose to be represented. We will impose that burden upon employees only where the circumstances of the first election were such that employees could not express a free and uncoerced choice of a collective bargaining representative." *Id.* at 3-4.

The lengths to which the Board has gone to avoid setting aside an election is demonstrated in the recent decision of *Frudden Enterprises, Inc.* (1981) 7 ALRB No. 22. In *Frudden,* the UFW was involved in an organizational campaign which culminated in a strike and expedited election. Prior to the election, the union repeatedly entered the employer's field during working hours without permission. Workers were physically threatened and assaulted. On one occasion, a mob of between 25 to 50 people, carrying UFW flags and led by a union organizer, converged on three tomato picking machines. *Id.* ALOD at 3-4. Dirt clods and tomatoes were thrown at the workers operating the machinery. The invaders then jumped up on the machines and shouted obscenities at the remaining employees. *Id.*, ALOD at 15-16. The workers were told that

their car windows would be smashed if they did not support the election. After the incident, the employees understandably did not return to work. Despite this and numerous other acts of physical violence and intimidation, the Board upheld the election. It concluded that: "The conduct shown on the record did not establish an atmosphere of fear and coercion which rendered impossible a free choice of collective bargaining representative." *Id.*, ALOD at 59.

In rejecting the employer's objections, the Board noted that:

> " . . . the burden of proof in an election preceding under Labor Code Section 1156.3(c) is on the party seeking to overturn the election. *TMY Farms* (Nov. 29, 1976) 2 ALRB No. 58; *NLRB* v. *Golden Age Beverage Company* (5th Cir. 1969) 415 F.2d at 26 . . . . This is a heavy burden, requiring an objecting party to come forward with 'specific evidence showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election' . . . ." *Id.*, ALOD at 49.

Utilizing this heavy burden, the Board concluded that the employer had failed to show "specific conduct which results in employees being turned away from the polls or prevented from voting." *Id.*, ALOD at 55. To justify its position, the Board rationalized that:

> " . . . especially in an industry in which high turnover alone may result in a diminished turn-out *a causal connection must be established between improper conduct and the employees' failure to vote,* or else elections would routinely be set aside based on highly speculative conclusions about employees' motives." (Emphasis added.) *Id.*, ALOD at 55.

Clearly the standards adopted by the Board in *Frudden* were not applied in the instant case. In contrast to the strict

causal connection requirement of *Frudden*, the Board in the case at bar goes to great lengths to *imply* a relationship between the acts of the Petitioners and the outcome of the election. With the exception of the disputed allegations involving the layoff of Clemente Fernandez, the record does not allege that any specific UFW supporter was denied the right to vote or was so intimidated that such a right was frustrated.

By setting aside the ABATTI election with the concurrent extension of the UFW's certification as collective bargaining agent, the Board has disenfranchised the majority of ABATTI employees who voted in the election. Given the proclivity of the Board to uphold representation elections where misconduct on the part of the UFW is found to exist, the same proclivity should be displayed in the context of a decertification election. Instead, a blatant double standard has been applied by the Board.

It should be noted that this same issue was extensively addressed earlier in the proceeding. (*See* Post-Hearing Brief of Tom Slovak at 22.) The Board, however, never explains its paradoxical position. If the decision is allowed to stand, an implicit sanction of the current double standard would likely result.

B. The Burden of Proof Imposed by the ALO and Upheld by the Board is Improper as a Matter of Law.

In overturning the results of the decertification election, the ALO's decision relies heavily on past unfair labor practices committed by ABATTI to infer antiunion animus. On many of the issues addressed, the ALO bases his findings on credibility resolutions which were with near uniformity decided against ABATTI. An inspection of both the Board and ALO decisions indicate that every charge of discriminatory motive is either inferred from past conduct or premised on the "finding" that

General Counsel's witnesses were credible while the witnesses called by ABATTI were not telling the truth.[17]

It is undisputed that the charges against ABATTI must be proven by a preponderance of evidence. Cases decided under the NLRA illustrate that the required proof must be more than mere suspicion or speculation. *Florida Steel Corp.* v. *NLRB,* (5th Cir. 1979) 587 F.2d 735 (the fact that an employee had been an active union member and the company was aware of his membership was no basis for inferring that his discharge was discriminatory). Similarly, it has been recognized that an anti-union motive on the part of an employer cannot be inferred if a proper motive could just as easily be inferred. *NLRB* v. *Hubber & Hubber Motor Express, Inc.* (1955) 223 F.2d 748. In short, the burden of proving an unfair labor practice by a preponderance of evidence rests with General Counsel. The employer never assumes the burden of disproving a violation. *Indiana Metal Products Corp.* v. *NLRB* (1959) 202 F.2d 613, 616; *Interlake Iron Corp.* v. *NLRB* (7th Cir. 1942) 131 F.2d 129.

In the instant case, the Board and the ALO assume that Petitioners' actions are improperly motivated. Past conduct of the Petitioners and their employees is repeatedly discussed as evidence of an anti-union animus on the part of Petitioners. *See* 7 ALRB No. 36, ALOD at 3-6, 31. A reading of the ALO Decision affirmed by the Board indicates that the burden was actually placed upon the Petitioners to disprove allegations of misconduct. The burden is misplaced.

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[17] An examination of the decision indicates that credibility determinations were critical to the ALO's findings regarding access violations. (ALO Decision, pp. 14, 15, 16); alleged threats by foreman Rios (ALO Decision, p. 29); justification for increased wages after the election (ALO Decision, p. 27, 11. 23-28); the allegedly discriminatory layoff of the Clemente Fernandez group (ALO Decision, pp. 32, 33, 37, 51, 61); and the reason for the discontinuance of the rappini crop (ALO Decision, pp. 43, 68).

1. The Credibility Resolutions Relied Upon by the ALO and Board Are Not Supported by Substantial Evidence.

In its Exceptions Brief, ABATTI called the Board's attention to the blatant imbalance of credibility resolutions made by the ALO and relied upon by the Board to support its decision. Nearly every resolution made was adverse to the Petitioners. Conversely, General Counsel's witnesses were found almost without exception to be credible.[18]

The ALO's (Nevins') treatment of the credibility issue is remarkably similar to his previous performance in *Sunnyside Nurseries, Inc.* (1979) 3 ALRB No. 42. In *Sunnyside,* Nevins found the employer guilty of numerous unfair labor practices. On review, the Court of Appeal expressly disapproved of the consistently broad and inadequately justified credibility resolutions made in favor of the union. *Sunnyside Nurseries, Inc.* v. *Agricultural Labor Relations Board* (1979) 93 Cal.App.3d 922. In rejecting several of the ALO's findings, the Court noted that:

> "In our study of the record, and our comparison of it with the Board's findings, we observe *without exception* that *every witness* produced by the complaining Union was expressly found 'credible' or to have given 'credible testimony,' . . . On the other hand, *also without exception, all* of Sunnyside's material witnesses . . . were expressly found 'unconvincing,' or to lack 'credibility'. . . . On account of this absolute imbalance of 'credibility' found by the hearing officer, *every one* of the numerous detailed factual issues presented to the hearing officer was resolved against Sunnyside." (Emphasis in original.) *Id.* at 931.

In the instant case, the Board relegated treatment of the credibility issue to a footnote. *See* 7 ALRB No. 36, ALOD at 2, fn. 3. The Board completely ignored ABATTI's argument that Nevins failed to fulfill the requirement of *carefully* and *specific-*

[18] *See* summary of credibility resolutions as set forth in Petitioners' Exceptions Brief and attached hereto as Exhibit "A."

ally stating how he arrived at his credibility conclusions. *Garment Workers Local 66* (1961) 134 NLRB 879; *Funkhauser Mills* (1961) 132 NLRB 245. In doing so, the Board never articulated any independent grounds for accepting or sustaining the credibility resolutions of the ALO, and indeed frequently deferred to those credibility resolutions in broad terms in the course of affirming various findings and conclusions. *E.g.*, 7 ALRB No. 36, ALOD at 7-8, 13.

C. The Board's Finding that ABATTI Provided Unlawful Assistance to the Workers Involved in the Decertification Effort is Not Supported by Substantial Evidence

Based upon speculative assumptions and extreme credibility resolutions, the ALO found that ABATTI both instigated and provided unlawful assistance to the workers in their decertification efforts. The ALRB understandably rejected the completely unwarranted finding that the Company was behind the decertification campaign but upheld the finding that it crossed the line into prohibited assistance. Specifically, the ALRB found that two kinds of conduct by ABATTI constituted unlawful assistance to Cruz and Castellano. First, it was found that ABATTI provided assistance by allowing Cruz and Castellano access to the workers, including some occasions during work hours. Second, it was found that ABATTI provided Cruz and Castellano with special benefits and privileges in carrying on their decertification campaign. 7 ALRB No. 36, ALOD at 5. Both findings will be dealt with in turn.

In resolving the access question entirely on the basis of credibility resolutions, the Board completely ignored other issues raised by the parties below. First, the collection of signatures by employees is qualitatively different from the collection of signatures by non-employee union organizers governed by the ALRB's access rule. Access by employees in a

nondisruptive manner is a proper exercise of their Section 1152 rights. A denial of access under the circumstances would have been unlawful.[19]

It is undisputed that the UFW was granted equal access to the Petitioners' workers during the period in question. The ALO acknowledged that:

> "[T]he decertification campaigning that took place in the fields during work-time was not unlike the treatment accorded to UFW representatives, who, according to several employee witnesses, visited various crews during work time prior to the election and were permitted to campaign in behalf of the UFW without the Company's intervention." 7 ALRB No. 36, ALOD at 54.

Cruz and Castellano, as employees of the Petitioners, had a greater right to organizational activity than nonemployee Union organizers. Nevertheless, they were treated no differently. Under the circumstances, it cannot be said that the Company provided unlawful assistance.

Such a conclusion is supported by decisions in the area. In *American Express Reservations, Inc.* (1974) 209 NLRB 1105, the employer was charged with providing illegal assistance to employees in a decertification campaign. The Board held that no unlawful assistance existed notwithstanding the fact that employees allegedly gathered signatures during working time since no evidence was presented to indicate that the union was

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[19] Because ABATTI never had a no solicitation rule, it would have been illegal to suddenly restrict solicitation in the face of a decertification or organizational campaign. Petitioners could not suddenly draft a rule or enforce a dominant no solicitation rule that did not exist in the past. *William H. Black Company* (1964) 150 NLRB 341. Moreover, in *Karahadian Ranches, Inc.* (1979) 5 ALRB No. 37, the Board addressed the question of whether or not an employee could be disciplined for handing out pro-union buttons during working time. The Board held that: "A no distribution rule, even if valid on its face, may not be applied to prohibit conduct which does not interfere with work, even when the employees are paid for such non-working time. This includes brief solicitations which occur while employees are waiting to begin work." (1979) 5 ALRB No. 37 at 3-4.

denied similar access to respond to the decertification. Similarly, in *Advertiser Company, Inc.* (1951) 97 NLRB 604, the NLRB ruled that there was no employer assistance where employees were allowed to circulate decertification petitions during working hours in the presence of supervisors, since the employer also permitted pro-union activity to be conducted.

In the instant case, the Union was free to campaign in its discretion. Moreover, it was well known to the UFW for at least a month that the decertification effort was taking place. Even if it is concluded that the Union did not enter the Petitioners' fields to campaign against decertification, the opportunity to do so was provided. As a result, it cannot be said that the Union received disparate treatment or that the Company provided impermissible assistance to its employees.

In a similar vein, even if every General Counsel witness is deemed to be completely credible the *worst* that can be said is that Cruz and Castellano gathered signatures during informal breaks with only infrequent and minor disruptions of work. In this regard, the ALRB has uniformly held that minor access violations when committed by the union will not overturn the results of a representation election.[20] The double standard adhered to by the Board is again apparent. Instead of being characterized as a "minor infraction," the alleged access violations are considered to be "evidence of ABATTI's unlawful

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[20] In *Sam Andrews' Sons* (1978) 4 ALRB No. 59, access violations were not sufficient to overturn the election. UFW organizers had apparently stopped crews for a number of minutes and slowed down the work of the crews by speaking with them. In *Ranch No.1, Inc.* (1979) 5 ALRB No. 1, the Board held that access violations by union organizers were not " . . . of such a character as to create an intimidating or coercive impact on the employees' free choice of a collective bargaining representative." *Id.* at 6. Similarly, in *Borchard Farms* (1976) 2 ALRB No. 16, union organizers met with workers in a shop area 45 minutes after commencement of the workday while the workers were waiting to be assigned to their jobs. The organizers also spoke with workers while they were engaged in job assignments. Nevertheless, the Board upheld the representation election noting that the organizers' conduct constituted only a "minimal and insubstantial encroachment upon the employer's premises." *Id.* at 10.

assistance to the employees in their decertification efforts." 7 ALRB No. 36, ALOD at 5. The fact that a decertification election as opposed to a representation vote is involved should not make a difference.

The Board's conclusion that Cruz was treated differently than other employees is also unsupported by the record. The Board rejected ABATTI's evidence demonstrating that alleged benefits given to Cruz were consistent with its historical treatment of senior employees. In doing so, reliance is placed on the unsupported assertion that "respondent's ordinary practices differ sufficiently from its treatment of Cruz in these respects [loan policy, history of large loans to employees in emergencies, permitting employees to charge personal items] to compel the conclusion that Cruz received special favorable treatment because of his involvement in the decertification campaign." 7 ALRB No. 36, ALOD at 6. Yet the Board does not purport to disapprove of the ALO's specific finding that "respondent's benevolence toward Cruz and Castellano fits within a pattern of similar treatment toward other senior, steady employees . . . ." 7 ALRB No. 36, ALOD at 53.

The evidence relied upon by the Board for the assertions regarding unlawful assistance is equally unsubstantiated. The Board emphasized a Christmas bonus received by Castellano and Cruz, while ignoring evidence that the bonuses did not even come close to equaling the wages that they would have earned had they remained fulltime employees of ABATTI. There is also a complete lack of evidence showing that the bonuses were either utilized in connection with the decertification efforts or that any employee (including Cruz) considered the bonus as support for the decertification campaign. Additionally, the Board ignored a longstanding company policy of allowing steady employees to charge various services and products to the Company's account merely because of the Company's inadvertence in failing to deduct a charge from Cruz' paycheck. Finally, the Board ignored overwhelming evidence regarding a long-standing policy of granting liberal

leaves of absence to steady employees, particularly when work is light, as it was in December, 1978, based upon the conclusion that a different approach was taken with respect to union advocate Rosa Briseno. Neither the Board nor the ALO cited any evidence or analysis to show that Briseno was similarly situated to Cruz or that the Company's approach was not based on history and reason. Specifically, no evidence is presented which indicates that the Company did not need the services of Briseno during the period of her absence. On the other hand, the record indicates that the Company did not require the services of Cruz during the period of his absence since the work for tractor drivers was typically light during the time period in question.

Most importantly, even if Cruz did receive some nominally preferential treatment, there is no showing of any causal link to the outcome of the election. It can hardly be said that either the alleged aid or access violations prevented any employee from voting or "interfered with the employee's exercise of free choice to such an extent that they materially affected the results of the election." *Frudden Enterprises, Inc.* (1981) 7 ALRB No. 22 at 49. A consistent application of the law requires that the election results be upheld.

D. The Board Erroneously Concluded that ABATTI Unlawfully Aided Cruz and Castellano in Securing Legal Representation

In reaching its finding regarding unlawful assistance, the Board concludes that ABATTI made "the arrangements which resulted in [Cruz, Castellano and Donate] being represented by counsel." 7 ALRB No. 36, ALOD at 7. The law in this area is clear. An employer can legally provide its employees with information necessary to obtain and file a petition for decertification and refer the employees to legal counsel for assistance. *Vernon Manufacturing Co.* (1974) 214 NLRB 285; *Solar Aircraft Co.* (1954) 109 NLRB 130; *Moore Drop Forging Co.* (1954) 108 NLRB 32; *Consolidated Rebuilders* (1968) 171

NLRB 187. The Board attempts to reconcile this line of cases by distinguishing between "naming or suggesting an attorney" and "bringing the attorney and employees together." 7 ALRB No. 36, ALOD at 7. Such a distinction has no basis in either law or reason. The fact that an ABATTI representative arranged at the request of Cruz and Slovak for a convenient meeting place is not qualitatively different from referring an employee to another attorney's office. Indeed it seems ironic that the same board which so frequently emphasizes the unique needs of agricultural employees, is now willing to distinguish NLRB precedent because the Company arranged for the initial meeting since the worker lacked home telephone service.

Also unwarranted is the Board's assertion that ABATTI "gave a Christmas party at which Slovak circulated the decertification petition." 7 ALRB No. 36, ALOD at 7, fn. 8. There is no evidence in the record to indicate that the Christmas party referred to was company sponsored nor did any of the posthearing briefs make such a contention. The ALO's factual finding was that "a party [was] held on December 16th at a restaurant known as La Coyota, where many of the crew gathered for eating and drinking." 7 ALRB No. 36, ALOD No. 19. Although the ALO found that "the occasion was used to solicit signatures for a decertification petition," he also acknowledged that there was no evidence that any supervisory personnel participated in the gathering of signatures. *Id.* at 19-20. As the ALO's decision explicitly suggests, this was in fact an annual Rios crew Christmas party, which was not sponsored by the Company but to which Company management personnel were traditionally invited.

E. The Board's Findings Regarding ABATTI's Decision to Discontinue its Rappini Crop are not Supported by Substantial Evidence and Conflict with Established Law

The Board's attempt to establish a violation of the Act in the face of Supreme Court precedent directly in conflict with the ALO's Decision came as a complete surprise to the Petitioners.

The ALO found that the Company violated its duty to bargain over the decision, and relied heavily on the partial closure cases now overruled by *First National Maintenance Corp.* v. *NLRB* (1981) 101 S.Ct. 2573; *see* 7 ALRB No. 36, ALOD at 9. Proceeding on an entirely new theory, the Board found that ABATTI determined not to grow rappini exclusively or primarily as a means of "strike proofing." 7 ALRB No. 36, ALOD at 11. In turn, the Board found discriminatory motive based upon insufficient justification for what it termed a "preemptive layoff." *Id.* at 12. In doing so, the Board twisted the evidence and ABATTI's legal arguments beyond recognition.

Prior to the Board's ruling, not a single witness during the proceeding, nor any party in argument, had attempted to claim that ABATTI's sole or primary reason for discontinuing rappini was to "strike proof" the Petitioners' operation. An analysis of the entire record clearly indicates that the decision to discontinue the crop was economically motivated. Although ABATTI possessed valid concerns about continuing a labor intensive crop which was particularly susceptible to the danger of a strike in the highly volatile Imperial Valley of 1978, this was by no means the only reason for the Company's decision. When Ben Abatti put together the lack of financial success which the Company had enjoyed with the crop in recent years together with the other factors involved, he made an economic decision to terminate the crop. (R.T. Vol. II, pp. 21-23.)[21]

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[21] The Board purports to reach the conclusion that ABATTI's sole or primary motive for terminating crop was an attempt at strike proofing by relying upon ABATTI's Exceptions Brief. 7 ALRB No. 36, ALOD at 10. This conclusion completely misrepresents the substance of Petitioners' Brief. At page 40 of the brief, ABATTI sets forth the reason for the decision. At no time did Petitioners contradict their basic position that the decision was economically motivated. In a different section of the brief, Petitioners offered several alternative grounds for concluding that they did not have a duty to bargain over the decision. One of the alternative grounds was that given the likelihood of strikes in the Imperial Valley, the employer was justified in taking "defensive measures." This alternative argument was reasonably advanced in view of the uncertainties of the law prior to the Supreme Court's decision in *First National Maintenance Corp.* (1981) 101 S.Ct. 2573, and can hardly be construed as some sort of factual admission that "strike proofing" was the sole or primary cause of ABATTI's decision.

Thus, even a cursory reading of the Exceptions Brief indicates that the Board's finding regarding strike proofing is simply not true. Although the susceptibility of the rappini crop to a strike was mentioned, ABATTI stated primarily economic grounds for its decision. (*See* Exceptions Brief at 140.)

The Board opinion implies that the decision to discontinue the rappini crop was motivated by a desire to discriminate against the Union and disenfranchise UFW supporters in the decertification election. This implication is easily pierced. First, it is permissible for ABATTI to be interested in seeing the decertification succeed, if ABATTI engaged in no improper conduct with respect thereto. Secondly, the field workers who ultimately worked for Studer were still in the employ of ABATTI until the melon freeze in December, after the first two petitions had been filed by Cruz and Castellano. Additionally, under any interpretation of the record, ABATTI made the decision not to grow the rappini long before any decertification effort commenced. Finally, the workers who were allegedly eliminated were not known UFW supporters and ABATTI would have been merely guessing in eliminating them from qualification to vote in the election.

It is uncontradicted that ABATTI made its final decision to terminate the rappini operation long before the decertification effort got underway. The decision to discontinue the crop was first made in April, 1978. (R.T. Vol. II, p. 31, ll. 5-6.) The land preparation, planting, fertilizing and cultivation took place under Studer's direction throughout the summer and fall of 1978. In September, 1978, Studer and ABATTI signed a contract whereby ABATTI would pack the rappini. (*See* G.C. Trial Exhibit 2.) Conversely, the decertification drive was not initiated by Cruz and Castellano until November, 1978. As a result, the evidence does not support the Board's conclusion that the rappini crop was terminated to eliminate support for the Union in the decertification election.

In a similar vein, if ABATTI was interested in discouraging UFW support by the termination of its rappini operation because of hostility toward rappini field employees, it is doubt-

ful that ABATTI would have encouraged Albert Studer to hire these individuals. In addition, the only reason the employees were laid off by Petitioners was because of the melon freeze.[22] The ALO and Board inexplicably rejected the evidence regarding the melon freeze on "credibility grounds."

Perhaps the most compelling evidence that ABATTI did not intend to disenfranchise the rappini crop workers is the fact that it strenuously opposed the dismissal of the first decertification petition which was filed on December 6, 1978. Under Section 20352 of the ALRB regulations, voting eligibility is determined on the basis of the employer's payroll during the last complete payroll period, prior to the filing of the election. To the extent that the decertification petition was filed on Tuesday, December 6, 1978, about the same time as the layoff of the melon crew due to the freeze, all of the employees laid off from the melon crew, including those who went to the rappini harvest, would have been eligible to vote. Yet, at the time of the ALRB's dismissal of the petition, ABATTI argued in a temporary restraining order proceeding that the December 6th eligibility period was appropriate for an election. The only reasonable conclusion is that ABATTI in no way attempted to disenfranchise the rappini employees.

In a similar vein, neither the ALO nor the Board produced any substantive evidence to indicate that the rappini workers were pro-union employees. The law is clear that before a finding can be made that an employer has discriminated against employees because of their union support, knowledge of their support must be shown by substantial evidence as opposed to inference, speculation, or coincidence. *See NLRB* v. *Shen Valley Meat Packers* (4th Cir. 1954) 211 F.2d 289; *Mantak Corporation* (1977) 231 NLRB 858; *Winn-Dixie Stores, Inc.* v. *NLRB* (4th Cir. 1971) 448 F.2d 8; *Hackett Precision Co.* v. *NLRB* (6th Cir. 1972) 459 F.2d 463. Accordingly, it is improper for the Board to conclude that ABATTI's motives in discontinuing the rappini crop were discriminatory.

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[22] The melon freeze which resulted in the layoff of the workers in question did not occur until December 5 or 6, 1978. (R.T. Vol. II, pp. 53-54.)

In short, a decision to discontinue the rappini crop was made long before the commencement of the decertification campaign. Again, the Board has gone to great lengths to infer a causal link between conduct of ABATTI and the election where no such link exists.

F. The Board's Finding that Pro-Union ABATTI Employees Were Discriminatorily Discharged Is Not Supported by Substantial Evidence on the Basis of the Record Considered as a Whole

The Board's conclusion that members of the Fernandez family were discriminatorily laid off is based largely upon highly suspicious credibility resolutions involving Fernando Franco.[23] A review of the record indicates that the layoffs were made necessary by an insufficiency of work and were not limited to union supporters. Moreover, the layoffs were consistent with the seniority list utilized by the Company. The Board's conclusion that the use of seniority was merely "a device to lend plausability" to the alleged discriminatory treatment of Fernandez, is pure speculation. 7 ALRB No. 36, ALOD at 13. Finally, no factual allegations of anti-union animus toward any employee except Clemente Fernandez are made.

A review of the pertinent law indicates that the questionable findings made by the ALO and upheld by the Board cannot support the conclusion that the Fernandez group was discriminatorily discharged. In determining whether or not there has been an illegal discharge and/or refusal to rehire involving several discriminatees, the evidence regarding each of the individuals needs to be analyzed in order to determine if an unfair labor practice has been committed. *Sterling Aluminum Co.* v. *NLRB* (8th Cir. 1968) 391 F.2d 731. General Counsel clearly failed to meet such a burden as to each alleged discriminatee. *See Borg-Warner Controls* (1960) 128 NLRB

[23] As was the case throughout his opinion, the ALO (Nivens) summarily dismissed the testimony of two Company witnesses which challenged Franco's version of the facts. (7 ALRB No. 36, ALOD at 32-33.)

1035. Similarly, the proof required must be more than mere suspicion or speculation and cannot be based upon inferences rather than proof. *Finmore Corp.*, 131 NLRB 557; *Interlake Iron Co. Corp* v. *NLRB* (7th Cir. 1942) 131 F.2d 129. In the case at bar, there is insufficient evidence to support the conclusion that the layoffs were either motivated by anti-union animus or sufficiently affected the results of the decertification election to warrant the remedy imposed.

G. The ALRB Erroneously Applied a Make-Whole Remedy in the Case at Bar

In the instant case, the ALRB ordered make-whole relief in accordance with its own ruling in *Adam Dairy* (1978) 4 ALRB No. 24. *See* 7 ALRB No. 36, ALOD at 17. *Adam Dairy* provided that make-whole relief should be applied in every case where there is a finding of a refusal to bargain under applicable precedent. This motion was explicitly overruled by the California Supreme Court in *J.R. Norton Co.* v. *ALRB* (1979) 26 Cal.3d 1.

In *J.R. Norton* (1978) 4 ALRB No. 39 the ALRB applied the rule of *Adam Dairy* to an employer's technical refusal to bargain for the purpose of seeking judicial review of its election objections which had been rejected by the ALRB. By refusing to follow the Board's approach, the court balanced "the need to discourage frivolous election challenges pursued by employers as a dilatory tactic designed to stifle self-organization" against "the important interest in fostering judicial review as a check on arbitrary administrative action in cases in which the employer has raised a meritorious objection to the election and the objection is rejected by the Board." 26 Cal.3d at 30. The court concluded that a blanket rule for applying the make-whole remedy would undermine employee free choice by discouraging the bringing of meritorious appeals. 26 Cal.3d at 35.

ABATTI submits that the principles outlined in *Norton* apply with equal force to the facts now before the Court. In this case, it is undisputed that several employees, on their own

initiative, gathered three separate decertification petitions, two of which were rejected by the ALRB. The record is clear that there was widespread dissatisfaction with the UFW among Company employees and that the employees spontaneously supported the decertification effort. Moreover, in the winter of 1979, immediately after the Company refused to recognize the Union, ABATTI employees failed to support a UFW strike. (R.T. Vol. XXVI, pp. 76-77.) Under these circumstances, where the employer has every reason to believe that its employees have voted out the union, it is highly inappropriate to impose make-whole relief for the period in which the employer is defending the validity of the election and litigating with respect to challenged ballots. This is true whether or not the employer's ultimate position is sustained.

The Board attempts to justify the make-whole relief by reasoning that "there is no good faith in a doubt which an employer has manufactured." 7 ALRB No. 36, ALOD at 8. This argument, however, is unsupported by the Board's own decision. Indeed, it is found that the Company did not instigate the decertification process. 7 ALRB No. 36, ALOD at 4. Although allegations of unlawful assistance are made, it can hardly be said that the Company was responsible for the Union's rejection.

In a similar vein, the case of *NLRB* v. *Grede Foundries, Inc.* (D.C. Cir. 1980) 628 F.2d 45 (cited by the Board at p. 9 of the Decision), is not controlling with respect to the instant case. In *Grede,* the employer refused to bargain solely on the basis of a decertification petition. The petition did not result in an election because of allegations regarding employer misconduct. Most importantly, the decision does not appear to apply a make-whole remedy. Unlike *Grede,* the case at bar contains ample evidence of a good faith doubt on the part of ABATTI of the Union's continuing majority status. As a result, the make-whole relief imposed is unwarranted and contrary to existing precedent.

At the very least, the ALRB should have applied the standard set forth in *Norton, supra,* to determine if ABATTI was going through the motion of contesting the issues before

the Court merely to avoid bargaining with the Union. The failure to even address the question is plain error which requires reversal of the Board's judgment and order.

Finally, the Board's order in this case ignores recent Court of Appeal authority limiting the scope of make-whole relief. *Masaji Eto* v. *ALRB* (1980) 6 ALRB No. 20; (1981) 5th Appellate District, Civil No. 5658. The Board's order provides for make-whole relief to continue beyond the date of the hearing in this matter. This type of relief was expressly disapproved by the Court in *Eto* as contrary to the spirit of the ALRB. ABATTI submits that the *Eto* decision is properly cited in actions involving the Agricultural Labor Relations Board despite the fact that it was ordered unpublished. Since the Board was a party to the *Eto* decision it is bound by that decision under the doctrines of collateral estoppel and *res judicata*. *Bernhard* v. *Bank of America* (1942) 19 Cal.2d 807, 122 P.2d 892; *Vanguard Recording Society* v. *Fantasy Records* (1972) 24 Cal.3d 410. Thus, the fact that the *Eto* decision was ordered unpublished should not permit the Board to ignore the directive of an appellate court regarding a previously litigated issue.

H. Even if ABATTI is Found to have Committed Unfair Labor Practices in Connection with the Decertification Election, the Board's Bargaining Order is Improper

Unlike the UFW, which has developed a well-funded and staffed program for organizing workers, the ABATTI employees seeking to decertify the Union possessed limited means to accomplish their goal. Notwithstanding the Board's rejection of two decertification petitions, the workers continued to collect signatures for a number of weeks and eventually forced an election. This is clearly not an instance where the UFW was caught off guard. Rather, the evidence introduced at the trial level indicates that a vigorous campaign was conducted by the Union to oppose the decertification effort. Under these circumstances, the election should not be set aside.

Even under the NLRA, a bargaining order would be improper given the facts of this case. The NLRB is unwilling to

impose such an extreme remedy absent serious unfair labor practices which interfere with the election process and preclude the holding of a fair election. *See NLRB* v. *Gissel Packing Co.* (1969) 395 U.S. 575. Accordingly, isolated threats and illegal interrogations will not overturn an election result. *Cameo Lingerie, Inc.* (1964) 148 NLRB 535; *Hammon & Irving, Inc.* (1965) 154 NLRB 1071.

In *Daisy's Originals, Inc. of Miami* v. *NLRB* (5th Cir. 1972) 468 F.2d 493, the court concluded that the employer had engaged in a "subtle campaign . . . to increase dissention in the shop and weaken the union's bargaining power." *Id.* at 498. Promises were made to increase benefits, in contravention of Section 8(a)(1) of the Act. *Id.* Nevertheless, no bargaining order was issued after the union's defeat in the election. The court concluded that only outrageous and pervasive unfair labor practices would support a bargaining order. *Id.* at 500. Conversely, it was held that the Board is not authorized to enter a bargaining order where the unfair labor practices had a "minimal impact" on the election machineries such that an election could be held. *Id.*

In the final analysis, the bargaining order entered in the instant case is clearly inappropriate. There is absolutely no causal link shown between the conduct allegedly engaged in by the Petitioners and the outcome of the election. Given the Board's reluctance to overturn representation elections won by the UFW, and its attempts to distinguish NLRB precedent in this regard because of the "unique needs of agricultural workers," the refusal to recognize the clear mandate of ABATTI employees in this instance is inexplicable. Indeed, the isolated unfair labor practices alleged in this case were not so pervasive as to justify the setting aside of a free election in a diversified unit the size of ABATTI. The workers voted in the privacy of an election booth. To disregard their vote is to make a mockery of the ALRA and to return labor relations in California to the undemocratic chaos out of which the ALRA was born.

IV

CONCLUSION

For each of the reasons set forth above, General Counsel failed to establish by a preponderance of the evidence that the Petitioners violated the Act. Moreover, the imposition of a bargaining order and make-whole remedy are entirely inappropriate. As a result, ABATTI respectfully submits that the alleged unfair labor practice charges be dismissed and that the decertification election results be upheld.

DATED: _____, 1982

Respectfully submitted,

GRAY, CARY, AMES & FRYE

By: _____

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APPENDIX C

Court of Appeal
State of California
FOURTH APPELLATE DISTRICT
DIVISION ONE

ABATTI FARMS, INC., AND ABATTI PRODUCE, INC.,

Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD,

Respondent

UNITED FARM WORKERS OF AMERICA, AFL-CIO, ET AL.,

Real Parties in Interest.

4 CIVIL 26468

ALRB No. 78-CE-53-E, et al., and 78-RD-2-E (7 ALRB No. 36)

THE COURT:

The petition for writ of review is denied.

Acting Presiding Justice

cc:

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APPENDIX D

Supreme Court No. _____
4th Civil No. 26468

In The Supreme Court
OF THE
State of California

ABATTI FARMS INC., AND ABATTI PRODUCE, INC.,
Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO
Real Party in Interest.

PETITION FOR HEARING

FOLLOWING DENIAL OF PETITION FOR REVIEW BY THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT, DIVISION ONE, OF A FINAL ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD.

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Supreme Court No. _____
4th Civil No. 26468

In The Supreme Court
OF THE
State of California

ABATTI FARMS INC., AND ABATTI PRODUCE, INC.,
Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD.
Respondent,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Real Party in Interest.

PETITION FOR HEARING

FOLLOWING DENIAL OF PETITION FOR REVIEW BY THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT, DIVISION ONE, OF A FINAL ORDER OF THE AGRICULTURAL LABOR RELATIONS BOARD.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

ABATTI FARMS, INC. and ABATTI PRODUCE, INC. ("Petitioner" or "ABATTI") hereby petition for a hearing to

consider the summary denial of its petition for review by the Court of Appeal, Fourth Appellate District, Division One. A copy of the order denying the writ is attached hereto as an appendix.

A hearing in this Court is necessary to secure uniformity of decisions, to secure the settlement of important questions of law and to assure Petitioner due process of law. Specifically, the AGRICULTURAL LABOR RELATIONS BOARD ("ALRB" or "Board") flagrantly ignored the mandate of this Court's decision in *J.R. Norton Co.* v. *ALRB*, 26 Cal.3d 1 (1979), requiring the Board to consider the facts and equities of each particular case in determining the appropriateness of imposing the drastic remedy of make-whole relief. The Board affirmed without comment the decision of its Administrative Law Officer ("ALO"), which recommended make-whole relief without considering *J.R. Norton* and without stating any basis whatever for imposing such a remedy. The Board abused its administrative discretion by failing to disclose the basis of its decision to impose the make-whole remedy, as required by *J.R. Norton.*

The significance of the Board's order and the appellate court's summary denial of ABATTI's appeal will not only jeopardize the existence of Petitioner, but also will extend beyond the circumstances of this case. If this decision is affirmed without any judicial review of the merits, the Board will continue to ignore the law set forth by this Honorable Court and will continue to apply the devastating make-whole remedy with unfettered caprice.[1] Due process demands judicial review of the Board's imposition of the make-whole remedy without consideration of the facts and equities of the case and without reasoned basis for its decision. This is especially so in light of the fact that *Nish Noroian* (1982) 8 ALRB No. 25, which sets forth the standards assertedly applied by the Board

[1] *See* Brief of the ALRB to the court below at pp. 51-52.

in *this* case,[2] is presently being reviewed by the same appellate court which summarily denied Petitioner's appeal. *See* 4 Civil No. 27889 (oral argument heard on March 1, 1983).

In summarily denying without reasons Petitioner's request for review the Court of Appeal acted in excess of the jurisdiction conferred it under Labor Code Section 1160.8. That section mandates the commission of a judicial act—enforcement, modification or setting aside of the Board's order—and thus requires a judicial determination of the cause. As such, a written decision with reasons stated is constitutionally required. (Cal. Const. Art. VI § 14.)

Such exercise of jurisdiction is further mandated by Article III, Section 3.5 of the California Constitution, which denies to agencies full adjudicatory authority over causes.

This case presents significant issues left unaddressed by the court in its decision in *Tex-Cal Land Mgmt., Inc.* v. *ALRB* (1979) 24 Cal.3d 335. If the Court of Appeals' summary denial is allowed to stand, Petitioner will have been provided no provable judicial review of this significant deprivation of property. Labor Code Section 1160.8, as construed by the court in *Tex-Cal,* and as applied by the court in this case, will be rendered unconstitutional under the Article I, Section 7 of the California Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution.

The Board's abuse of discretion in flagrantly ignoring the precedent of this Court is only the most obvious—and perhaps most important—example of clear error demonstrated by this record. The Board further abused its discretion by applying a partisan double standard in cases challenging the results of representation and decertification elections. The Board's con-

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[2] *See, e.g., Kawano, Inc.*, 7 ALRB No. 16, 4th Civil No. 26468, wherein the employer's appeal of an ALRB order imposing the make-whole remedy was summarily denied by the appellate court. A Petition for Hearing in this Court was *also* summarily denied on March 27, 1982. That agricultural employer is presently in bankruptcy proceedings. *See* U. S. Bankruptcy Court No. 82-5249-U11.

clusions that Petitioner committed several statutory violations were clearly erroneous as a matter of law and not supported by substantial evidence. As to several crucial issues, the ALRB failed to follow binding precedent of the National Labor Relations Act ("NLRA").

For these reasons, and because of the significant constitutional issues raised by the Court of Appeals' summary refusal to review the matter, this Court should grant this Petition for Hearing.

I

STATEMENT OF THE CASE

This case involves an election conducted at ABATTI on December 27, 1978. The workers voted to decertify the UNITED FARM WORKERS OF AMERICA, AFL-CIO (hereinafter "UFW") as their bargaining representative. Subsequent to the election, unfair labor practice charges were filed against ABATTI for allegedly engaging in illegal conduct in conjunction with the election.

In a consolidated proceeding involving unfair labor practice charges, election objections and challenged ballots, ALRB Administrative Law Officer David Nevins overturned the election. Nevins found that ABATTI had interfered with the workers' organizational rights set forth in Section 1152 of the Agricultural Labor Relations Act (hereinafter "the Act").

The ALRB affirmed with slight modification the ALO's findings in a decision rendered on October 28, 1981. Specifically, it held that ABATTI had unlawfully supported the decertification drive, laid off union supporters, and refused to bargain over the decision to discontinue a crop.

ABATTI's appeal of the ALRB's order was summarily denied by the Court of Appeal, Fourth Appellate District, Division One. ABATTI brings this Petition within ten days of that denial.

II

STATEMENT OF THE FACTS

The facts in this case are both complicated and disputed. The record contains 29 volumes of transcript. A summary of the entire record is provided in Petitioners' exceptions brief to the ALRB. A short description of the relevant facts is set forth below.

Petitioners harvest and market agricultural produce. On November 18, 1977, the UFW was certified by the Board as the collective bargaining representative of ABATTI employees. The UFW and ABATTI signed their first Collective Bargaining Agreement on June 7, 1978. The Agreement's expiration date was November 18, 1978. Notwithstanding the contract, dissatisfaction with the Union soon surfaced among the ABATTI workers.[3] The most common complaint involved a general dissatisfaction with union medical benefits.[4]

A. The Decertification Petitions.

The move toward decertification started by two employees. Manuel Castellano was an irrigator with ABATTI. Toribio Cruz was a tractor driver. Both workers were long-term employees of the Petitioners. Castellano has been terminated by ABATTI for his refusal to join the UFW as required by the UFW under the Collective Bargaining Agreement. (*See* R.T. Vol. VI, p. 114.)[5] Cruz joined the decertification effort because he had become unhappy with the Union and its medical plan. (V:13.) Castellano and Cruz began circulating petitions signed by ABATTI workers in November, 1978. The first petition was collected on a yellow pad of paper. When the workers

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[3] One worker testified that the Union had shot up his house and threatened his family and that "90% of the people did not want the union." (V:82-83.)

[4] *See* testimony of Marcos Diaz Vicento (XXIII:81-93); Ben Abatti (XXI:57-58); Robert Tafoya (XXV:124); Severino Piceno (XXIII:124, 127).

[5] Hereinafter, the Reporter's Transcript will be cited as follows: [*volume*]:[*page(s)*].

presented the signatures to the ALRB, they were told that the petition was invalid since the proper state forms had not been used. (XXIII:120.) Castellano and Cruz then collected signatures on the forms provided by the ALRB. The Board again refused to accept the signatures. It was not until the attorney for Castellano and Cruz, Tom Slovak, aided in procuring a third set of signatures that the decertification election was ordered.[6]

B. Benefits Allegedly Provided to Cruz and Castellano.

Neither Cruz nor Castellano worked for ABATTI during the decertification campaign. Castellano was terminated in November, 1978 for refusing to join the Union. (VI:102.) Cruz took an informal leave of absence from ABATTI. This was apparently a common practice among long-term employees when work was slow.[7] Work was generally slow for tractor drivers during the time that Cruz collected the signatures. (IV:103, 104.)

1. Medical Benefits for Employees.

Upon the expiration of the UFW Collective Bargaining Agreement in January, 1979, ABATTI instituted its own medical insurance plan. The Company's intention to implement the plan was discussed with the Union prior to its initiation. (XXI:209, 210.) The Company wanted to ensure that its employees were going to be covered by some insurance after the contract expired. (*See* G.C. Exhibit 51; XXI:210.) ABATTI was also concerned that many of its workers were not eligible under the Union plan. (XXI:57, 58.)

Cruz and Castellano were listed on the eligibility list of the new plan despite the fact that they had not technically worked a

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[6] It should be noted that none of the alleged violations involving access or threats relied upon by the board occurred with respect to signatures gathered on the third and controlling petition.

[7] *See* testimony of employees Robles (XXVII:65-67); Hernandez (XXVII:68-73); Nevarro (XXVII:75-89); *see also* testimony of T. Cruz (IV:104-105).

sufficient number of hours to qualify. It was not unusual for the Company to place a long-term worker on the eligibility list notwithstanding a deficiency of hours. (XXI:66-67.) Cruz and Castellano, however, benefited only minimally from their inclusion on the list. Castellano received no medical benefits. Cruz had submitted $84.00 in health insurance claims at the time of the hearing. (XXVI:166.)

2. Pay Advances and Loans.

Pay advances were given to Castellano in January and February of 1979. Cruz received a Christmas bonus on December 23, 1978. It was a common practice for ABATTI to give its employees advances and bonuses similar to those received by Castellano and Cruz.[8]

It was also common for ABATTI employees to charge repairs at a local glass company to Petitioners' account. (XXV:56-65.) On one occasion, Cruz charged the repair of a broken windshield which he believed was shot out by UFW supporters. (IV:116, 119; XXIX:43-44.) The Company allowed Cruz to repay the amount through deductions from his checks. (IV:119, 121.)

3. Petitioners' Selection of an Attorney.

Cruz, Castellano and the other ABATTI workers engaged in the decertification drive were aided by attorney Tom Slovak.

After Cruz' second decertification petition had been dismissed by the ALRB he asked an employer representative, Jim House, whether the Company could assist him in an appeal. House contacted the Petitioners' attorney, Scott Wilson. Wilson met with Cruz and explained that his firm could not represent the workers. At the request of Cruz, Wilson contacted attorney Tom Slovak of Best, Best & Krieger in Palm Springs. Slovak went to El Centro after receiving assurances that the Company

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[8] *See* ABATTI Trial Exhibits 13 and 14. (XXVI:151-162.) For example, irrigator Jesus Miranda testified that he had borrowed up to $500.00 from ABATTI at one time and that he owed as much as $2,300.00 in total. (XXVIII:2-3.)

had not instigated the petition. (XIV:12-26, 40-51.) A meeting was arranged between Slovak and Cruz. After meeting with Cruz, Slovak decided to accept the case on a pro bono basis. (XIV:59-64.) Although Slovak initially contemplated only filing an appeal from the decertification petition's dismissal, he soon became involved in a full scale decertification effort.

Slovak used the library of Byrd, Sturdevent, Nassif & Pinney (who were ABATTI's attorneys at that time) since it contained the only labor materials in the Imperial Valley, with the exception of the ALRB. All clerical and phone costs incident to using the library were paid by Best, Best & Krieger. (XIV:56-57, 144, 146.) Distrustful of Slovak's claim that he had no involvement in the matter prior to December 13, 1978, the Board subpoenaed the telephone records of Slovak, the law firm of Byrd, Sturdevant, Nassif & Pinney, ABATTI FARMS, INC. and the personal residence of Ben Abatti. The records failed to reveal any telephone conversations or any other involvement of Slovak prior to December 13, 1978. (*See* testimony of Cruz and Slovak, IV:146-204; XIV:5-164.)

4. Alleged Aid in Procuring Signatures.

The alleged involvement of Jose Rios, an ABATTI foreman, in the workers' decertification effort was disputed at the hearing. Rios was involved in a shooting incident with a UFW supporter in May, 1979. The incident occurred nearly six months after the decertification election at issue and was unrelated to it.

With regard to the election, Rios attended an annual Christmas party given by the workers where signatures for the decertification petition were gathered by Eva Donate and Tom Slovak. (XVII:18-19.) It was never alleged that Rios collected signatures. (XVII:18, 70.)

Rios also gave two ABATTI workers who were collecting signatures for the decertification campaign a ride in his car. UFW supporters whose signatures were sought testified that they were intimidated by Rios. In one of the alleged incidents,

the worker whose signature was requested testified that Rios was barely visible from the car and never spoke to her. (XXIX:3-4.) With respect to the other incident, Rios allegedly gave the witness a dirty look. (*See* XI:19.)

C. Access Violations.

During November and early December, Cruz collected signatures from ABATTI employees working in the fields. ABATTI did not have a no solicitation rule in effect at that time. Irreconcilable testimony was given regarding whether the signatures were gathered during working hours as opposed to break or lunchtime.

It is clear that Cruz visited the crew of Angel Avina. General Counsel's witness testified that Avina spoke briefly with Cruz and told him that he could speak with the workers during their lunch hour. (XI:37.) Cruz spoke with several employees as they came out of the fields during a break. After speaking with Avina, Cruz left the field and did not return. (*See* XI:38.)

Cruz also spoke to members of Avina's crew when the foreman was not present. Cruz would generally visit the crew during lunchtime. In addition, Cruz spoke to workers when the melon picking machine was being turned around at the end of a row. The process usually takes between 10 and 12 minutes to complete. (XXIV:51.) During this time, the workers would normally take a short break to get a drink of water or use the restroom facilities. (XXIV:98.) Witnesses for General Counsel testified that Manuel Gabino and Trinadad Soto ordered the machines shut down on several occasions to allow the workers to listen to Cruz.[9] Witnesses for Petitioners indicated that the crew's normal schedule was not adjusted to accommodate Cruz and that Cruz spoke with the crew for only the amount of time it took to turn the machine around.[10]

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[9] *See* testimony of UFW crew representative, Guadalupe Covarrubias and her husband, Tadeo. (VII:78-79; VIII:2-12.)

[10] *See* testimony of Maria Escobedo (XXVII:38, 39); Avina (XXIV:5); Soto (XXVII:29).

The fact that the UFW was granted access to ABATTI's fields during working hours was also addressed at the hearing. UFW representatives regularly entered the fields during working hours in the month of December. (XXIII:32-33.) A number of witnesses attested to the fact that the UFW would visit the Petitioners' workers to gain support for the Union in the upcoming decertification election.[11] ABATTI foremen granted the Union access whether or not permission to enter the fields was requested. (V:179, 181.)

Witnesses for the Union testified that UFW representatives visited the fields not to solicit support for the election but rather to pursuade the workers to sign a new contract. (XXIII:57-58; XXVIII:59)

D. Discriminatory Acts Against UFW Supporters Allegedly Committed by ABATTI.

1. Discontinuation of the Rappini Crop.

As early as April, 1978, Ben Abatti considered discontinuing his rappini crop. (II:31.) Rappini is a broccoli-type of vegetable; its market price fluctuates greatly from year to year. (II:18-23.) Because of the crop's risky nature, most farmers in the Imperial Valley do not plant it.[12] ABATTI had lost money on its rappini crop in recent years. (II:23; XXI:51.) ABATTI felt that increased acreage in other crops would be a safer and more stable investment. Given the recent history of strikes in the Imperial Valley and the fact that the collective bargaining agreements of major growers in the Imperial Valley would expire at the same time, ABATTI was also concerned about a strike in the middle of the rappini harvest. (XXI:45-55.)

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[11] *See* testimony of Palacio (UFW representatives overheard discussing insurance, better treatment and better wages) (XXIV:9-10); Vicenta Orta (Union representatives would encourage workers to support the Union and ask for votes in the upcoming election). (XXIII:48-49).

[12] Abatti testified that the only remaining growers of the crop were Albert Studer and D'Arrigo Brothers. (II:23.)

Notwithstanding the crop's high-risk nature, Albert Studer, Abatti's brother-in-law, was interested in growing rappini. (II:27-28.) He was enticed by the potential for high profits. Studer was employed as a full-time foreman for Petitioners. Ben Abatti testified that it was not unusual for persons in such a position to have independent farming operations.[13] As a small operator, however, Studer lacked the packing and marketing capabilities of the Petitioners. Accordingly, in September of 1978, Studer and ABATTI entered into an agreement whereby Studer would grow the rappini and ABATTI would pack, ship and market the crop. (*See*, G.C. Trial Exhibit 2.) Studer completely financed the operation without aid from ABATTI. (*See* II:29; XIV:196-207.) ABATTI did provide custom tractor work to prepare the field for planting. (II:32, 35.) This work was paid for by Studer. (*Id.*)

With regard to the harvesting of the rappini, Studer had originally planned to hire an independent contractor to arrange for the necessary labor. (XIV:213.) However, in December 1978, a freeze in the Imperial Valley cut short ABATTI's melon harvest. (II:53-54; XIV:213.) Studer hired the employees laid off by ABATTI for lack of work. The workers in these crews were hired and paid directly by Studer. (II:59.) No contract existed between ABATTI and Studer with respect to the crews' employment. (*Id.*)

E. Fernandez Group Layoff.

In December, 1978, Supervisor Jose Rios laid off six employees. A number of crew members testified that very little work was available during the month of December and that the entire crew was forced to cut back on the number of hours worked.[14] In previous years, the typical response to such a situation was to cut back five to six employees until additional

[13] Studer himself owns 400 acres. He leases two hundred of the acres to other farmers. He farms the remaining acreage himself. (XIV:182.)

[14] *See* testimony of Adelina Moreno (XXII:68); Eva Donate (XXIV:120-121); Jose Rios (VI:83-88).

work again became available. (V:186-187.) 1978 was no exception. At the direction of the general manager, Rios laid off five employees on the basis of seniority. (V:198, 194.) One of the employees was the UFW crew representative, Clemente Fernandez. (V:195.) Rios made the layoffs on the basis of his understanding of the crew members' seniority status. After the layoffs, Rios went to the ABATTI personnel office to confirm his understanding of the proper seniority order. (V:206.) Rios was informed by the office that Maria Valdez had less seniority than Fernandez and the others and would have to be laid off also. She was laid off the following day. (V:199.) The layoffs were made pursuant to a seniority list prepared by the office since the Union had failed to supply a list despite the fact that the Collective Bargaining Agreement required it to do so. (*See* G.C. Trial Exhibit 10.)[15]

F. Discipline of Rosa Briseno.

Rosa Briseno was the UFW representative for foreman Palacio's crew. Briseno had a history of failing to report for work. (XIII:52, 54.) On the morning of November 27, 1978, Briseno did not work because of her attendance at an industry-wide negotiation session as a UFW representative. The Petitioners were not involved in these negotiations. Prior to leaving, Briseno did not receive a leave of absence from ABATTI.[16]

Upon learning of Briseno's action, ABATTI representative Jim House told foreman Palacio that Briseno should not return to work until the absence problem was straightened out. (XXVI:42.) House was apparently upset with the frequency

[15] General Counsel Trial Exhibits 42 and 59 substantiate the fact that Clemente and the others were laid off in seniority order. Seniority was computed on the basis of time that the employee had worked for ABATTI. Leaving the crew of Rios to work in another crew did not amount to a break in seniority. Thus, Eva Donate, Adelina Moreno and Salas did not lose their seniority status because they had worked in other crews.

[16] Rosa Briseno did inform her foreman on he morning of her absence that she was not going to work that day. (XIII:15.)

and unpredictability of Briseno's absences. House contacted ABATTI's attorney, Tom Nassif, and was advised that Briseno should be permitted to come back to work, but not paid for the time she was absent. (XXVI:45, 26.) This proposal was rejected by the Union. It was only after the Union protested the refusal of the Company to pay Briseno back wages that House adjusted her seniority date with the Company to the date she returned to work. This was done to strengthen the Company's bargaining position. (XXVI:48-60.) House stated that if the matter had been submitted to arbitration as contemplated by the collective bargaining agreement, it was his position that Briseno would retain her original seniority but receive no backpay for the days she did not work. (XXVI:50.)

G. Christmas Party at La Coyota.

For a number of years the workers at ABATTI had thrown an annual Christmas party. In December, 1978, the workers gathered at La Coyota, a restaurant frequented by members of the crew. General Counsel's witnesses testified that several supervisors were present at the meeting. (XVII:16-17.) None of the supervisors were observed collecting signatures. Signatures to support the decertification drive were collected by worker Eva Donata (XXIV:123) and attorney Tom Slovak. (XVII:18.)

This is the complete factual record on which the ALRB imposed a make whole penalty which may run into the many millions of dollars, and disenfranchised hundreds of agricultural employees.

III
ARGUMENT

A. IN REFUSING TO RECOGNIZE THE WORKERS' REJECTION OF THE UFW, THE BOARD FAILED TO ADHERE TO ITS OWN STANDARDS REGARDING THE OVERTURNING OF AN ELECTION.

The Agricultural Labor Relations Act (hereinafter "ALRA") was enacted to protect the rights of agricultural employees with respect to the selection or rejection of a bargaining representative. It was clearly not created to serve the vested interest of either employers or unions. In its preamble at Section 1, the ALRA provides in pertinent part that its goal is: "[T]o insure peace in the agricultural field by guaranteeing justice for agricultural workers and stability in labor relations."

California Labor Code Section 1140.2 echoes such a sentiment by noting that:

> "[T]he policy of the State of California is to encourage and protect the rights of agricultural employees to full freedom of association, self-organization and designation of representatives of their own choosing . . . ."

In the relatively short history of the ALRA, it is only natural that the initial questions facing the Board were those concerning representation elections and unfair labor practices committed during union organizational campaigns. Few Board cases to date have addressed election objections in the context of a decertification election. Nevertheless, it is inevitable in the development of labor relations that labor unions must accept decertifications just as employers must accept certifications. The history of the National Labor Relations Act (hereinafter "NLRA") indicates that despite an increasing number of successful decertification elections, labor unions continue to exist and prosper on a national scale.

It is generally recognized that the NLRB applies similar standards to certification and decertification elections. *See Colonial Hardware Flooring Company, Inc.* (1948) 76 NLRB 1039, 21 LRRM 1241; *Soule Steel Co.*, (1961) CCH 10,602; *S. B. Cattrell & Sons Co.* (1949) 87 NLRB 1. Given the ALRB statutory directive to adhere to NLRB precedent, it would seem that the Board would apply the same rules to decertification elections that govern a representation vote. The ALRB has failed to live up to such an expectation in the instant case.

From its earliest days, the ALRB has focused on the "unique characteristics of the agricultural worker" to uphold the results of a representation election notwithstanding misconduct on the part of the Union.[17] In *Samuel F. Vener Co.* (1975) 1 ALRB No. 10, the Board rejected the NLRB "laboratory conditions" test used to determine the legitimacy of an election. In reaching its conclusion, the ALRB held that:

> "... the typically seasonal and often transitory nature of that employment makes repetition of the experiment difficult, particularly if the harvest season in which the original election was conducted is over by the time the election is reviewed. Setting an election aside in the context of agricultural employment thus carries implications beyond those involved in the normal industrial situation." *Id.* at 3.

A similar conclusion was reached in *D'Arrigo Brothers* (1977) 3 ALRB No. 37. There the UFW was charged with numerous acts of misconduct in conjunction with a representation election. Notwithstanding allegations of threats and illegal

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[17] *See Patterson Farms, Inc.* (1976) 2 ALRB No. 59 (economic and physical threats by union insufficient to overturn election results; uncorroborated heresay evidence does not constitute substantial evidence to support a finding of the Board); *Sam Andrews' Sons* (1978) 4 ALRB No. 59 (access violations insufficient to overturn election); *Ranch No.1, Inc.* (1979) 5 ALRB No. 1 (threats and access violations by the union insufficient to overturn election); *Borchard Farms* (1976) 2 ALRB No. 16 (numerous access violations insufficient to overturn election).

campaigning, the Board certified the Union over objections from the employer. In justifying its decision, the Board set forth the following rationale:

> "When the NLRB decides to overturn an election and conduct a rerun of the 'experiment,' the rerun election can usually be held as soon as the determination to set the first election aside is made and can be held among substantially the same electorate. In the agricultural labor context, rerun elections, if they are to have the same standards of employee participation as the initial election, generally cannot be conducted until the next peak of employment which may be in the next harvest season, a year after the first election. Furthermore, the electorate will likely be substantially changed. Thus, our decision to set aside an election in the agricultural context means that the employees will suffer a serious delay in realizing their statutory right to collective bargaining representation if they choose to be represented. We will impose that burden upon employees only where the circumstances of the first election were such that employees could not express a free and uncoerced choice of a collective bargaining representative." *Id.* at 3-4.

The lengths to which the Board has gone to avoid setting aside an election is demonstrated in the recent decision of *Frudden Enterprises, Inc.* (1981) 7 ALRB No. 22. In *Frudden*, the UFW was involved in an organizational campaign which culminated in a strike and expedited election. Prior to the election, the union repeatedly entered the employer's field during working hours without permission. Workers were physically threatened and assaulted. On one occasion, a mob of between 25 to 50 people, carrying UFW flags and led by a Union organizer, converged on three tomato packing machines. *Id.*, ALOD at 3-4. Dirt clods and tomatoes were thrown at the workers operating the machinery. The invaders then jumped up on the machines and shouted obscenities at the remaining employees. *Id.*, ALOD at 15-16. The workers were told that

their car windows would be smashed if they did not support the election. After the incident, the employees understandably did not return to work. Despite this and numerous other acts of physical violence and intimidation, the Board upheld the election. It concluded that: "The conduct shown on the record did not establish at atmosphere of fear and coercion which rendered impossible a free choice of collective bargaining representative." *Id.*, ALOD at 59.

In rejecting the employer's objections, the Board noted that:

> "... the burden of proof in an election preceding under Labor Code Section 1156.3(c) is on the party seeking to overturn the election. *TMY Farms* (Nov. 29, 1976) 2 ALRB No. 58; *NLRB v. Golden Age Beverage Company* (5th Cir. 1969) 415 F.2d at 26 .... This is a heavy burden, requiring an objecting party to come forward with 'specific evidence showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election' ...." *Id.*, ALOD at 49.

Applying this heavy burden, the Board concluded that the employer had failed to show "specific conduct which results in employees being turned away from the polls or prevented from voting." *Id.*, ALOD at 55. To justify its position, the Board rationalized that:

> "... especially in an industry in which high turnover alone may result in a diminished turn-out *a causal connection must be established between improper conduct and the employees' failure to vote*, or else elections would routinely be set aside based on highly speculative conclusions about employees' motives." (Emphasis added.) *Id.*, ALOD at 55.

Clearly the standards adopted by the Board in *Frudden* were not applied in the instant case. In contrast to the strict

causal connection requirement of *Frudden*, the Board in the case at bar goes to great lengths to *imply* a relationship between the acts of the Petitioners and the outcome of the election. With the exception of the disputed allegations involving the layoff of Clemente Fernandez, the record does not allege that any specific UFW supporter was denied the right to vote or was so intimidated that such a right was frustrated.

By setting aside the ABATTI election with the concurrent extension of the UFW's certification as collective bargaining agent, the Board has disenfranchised the majority of ABATTI employees who voted in the election. Given the proclivity of the Board to uphold representation elections where misconduct on the part of the UFW is found to exist, the same proclivity should be displayed in the context of a decertification election. Instead, a blatant double standard has been applied by the Board.

It should be noted that this same issue was extensively addressed earlier in the proceeding. (*See* Post-Hearing Brief of Tom Slovak at 22.) The Board, however, never explains its paradoxical position. If this decision is allowed to stand, an implicit sanction of the current double standard would likely result.

B. The Burden of Proof Imposed by the ALO and Upheld by the Board is Improper as a Matter of Law.

It is undisputed that the charges against ABATTI must be proven by a preponderance of the evidence. Cases decided under the NLRA illustrate that the required proof must be more than mere suspicion or speculation. *Florida Steel Corp.* v. *NLRB* (5th Cir. 1979) 587 F.2d 735 (the fact that an employee had been an active union member and the company was aware of his membership was no basis for inferring that his discharge was discriminatory). Similarly, it has been recognized that an anti-union motive on the part of an employer cannot be inferred if a proper motive could just as easily be inferred. *NLRB* v. *Hubber & Hubber Motor Express, Inc.* (1955) 223 F.2d 748. In short, the burden of proving an unfair labor

practice by a preponderance of evidence rests with General Counsel. The employer never assumes the burden of disproving a violation. *Indiana Metal Products Corp.* v. *NLRB* (1959) 202 F.2d 613, 616; *Interlake Iron Corp.* v. *NLRB* (7th Cir. 1942) 131 F.2d 129.

In the instant case, the Board and the ALO assume that Petitioners' actions are improperly motivated. Past conduct of the Petitioners and their employees is repeatedly discussed as evicence of an anti-union animus on the part of Petitioners. *See* 7 ALRB No. 36, ALOD at 3-6, 31. A reading of the ALO Decision affirmed by the Board indicates that the burden was actually placed upon the Petitioners to disprove allegations of misconduct. The burden is misplaced.

C. The Board's Finding that ABATTI Provided Unlawful Assistance to the Workers Involved in the Decertification Effort is Not Supported by Substantial Evidence.

Based upon speculative assumptions and extreme credibility resolutions, the ALO found that ABATTI both instigated and provided unlawful assistance to the workers in their decertification efforts. The ALRB understandibly rejected the completely unwarranted finding that the Company was behind the decertification campaign but upheld the equally unwarranted finding that ABBATI engaged in prohibited assistance. Specifically, the ALRB found that two kinds of conduct by ABATTI constituted unlawful assistance to Cruz and Castellano. First, it was found that ABATTI provided assistance by allowing Cruz and Castellano access to the workers, including some occasions during work hours. Second, it was found that ABATTI provided Cruz and Castellano with special benefits and privileges in carrying on their decertification campaign. 7 ALRB No. 36, ALOD at 5. Both findings with be dealt with in turn.

In resolving the access question entirely on the basis of credibility resolutions, the Board completely ignored other issues raised by the parties below. First, the collection of

signatures by employees is qualitatively different from the collection of signatures by non-employee union organizers governed by the ALRB's access rule. Access by employees in a nondisruptive manner is a proper exercise of their Section 1152 rights. Indeed, a denial of access under the circumstances would have been unlawful.[18]

It is undisputed that the UFW was granted equal access to the Petitioners' workers during the period in question. The ALO acknowledged that:

> "[T]he decertification campaigning that took place in the fields during work-time was not unlike the treatment accorded to UFW representatives, who, according to several employee witnesses, visited various crews during work-time prior to the election and were permitted to campaign in behalf of the UFW without the Company's intervention." 7 ARLB No. 36, ALOD at 54.

Cruz and Castellano, as employees of the Petitioners, had a greater right to organizational activity than nonemployee Union organizers. Nevertheless, they were treated no differently. Under the circumstances, it cannot be said that the Company provided unlawful assistance.

In this regard, the ALRB has uniformly held that minor access violations when committed by the union will not over-

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[18] Because ABATTI never had a no solicitation rule, it would have been illegal to suddenly restrict solicitation in the face of a decertification or organizational campaign. Petitioners could not suddenly draft a new rule or enforce a no solicitation rule that had not been enforced in the past. *William H. Black Company* (1964) 150 NLRB 341. Moreover, in *Karahadian Ranches, Inc.* (1979) 5 ALRB No. 37, the Board addressed the question of whether or not an employee could be disciplined for handing out pro-union buttons during working time. The Board held: "A no distribution rule, even if valid on its face, may not be applied to prohibit conduct which does not interfere with work, even when the employees are paid for such non-working time. This includes brief solicitations which occur while employees are waiting to begin work." (1979) 5 ALRB No. 37 at 3-4.

turn the results of a representation election.[19] The double standard adhered to by the Board is again apparent. Instead of being characterized as a "minor infraction," the legal access violations are considered to be "evidence of ABATTI's unlawful assistance to the employees in their decertification efforts." 7 ALRB No. 36, ALOD at 5. The fact that a decertification election as opposed to a representation vote is involved should not make a difference.

The evidence relied upon by the Board for the assertions regarding unlawful assistance is equally unsubstantiated. The Board emphasized a Christmas bonus received by Castellano and Cruz, while ignoring evidence that the bonuses did not even come close o equalling the wages that they would have earned had they remained fulltime employees of ABATTI.

Most importantly, even if Cruz did receive some nominally preferential treatment, there is no showing of any causal link to the outcome of the election. It can hardly be said that either the alleged aid or access violations prevented any employee from voting or "interfered with the employee's exercise of free choice to such an extent that they materially affected the results of the election." *Frudden Enterprises, Inc.* (1981) 7 ALRB No. 22 at 49. A consistent application of the law requires that the election results be upheld.

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[19] In *Sam Andrews' Sons* (1978) 4 ALRB No. 59, access violations were not sufficient to overturn the election. UFW organizers had apparently stopped crews for a number of minutes and slowed down the work of the crews by speaking with them. In *Ranch No.1, Inc.* (1979) 5 ALRB No. 1, the Board held that access violations by union organizers were not " . . . of such a character as to create an intimidating or coercive impact on the employees' free choice of a collective bargaining representative." *Id.* at 6. Similarly, in *Borchard Farms* (1976) 2 ALRB No. 16, union organizers met with workers in a shop area 45 minutes after commencement of the workday while the workers were waiting to be assigned to their jobs. The organizers also spoke with workers while they were engaged in job assignments. Nevertheless, the Board upheld the representation election noting that the organizers' conduct constituted only a "minimal and insubstantial encroachment upon the employer's premises." *Id.* at 10.

D. The Board Erroneously Concluded that ABATTI Unlawfully Aided Cruz and Castellano in Securing Legal Representation.

In reaching its finding regarding unlawful assistance, the Board concludes that ABATTI made "the arrangements which resulted in [Cruz, Castellano and Donate] being represented by counsel." 7 ALRB No. 36, ALOD at 7. The law in this area is clear. An employer can legally provide its employees with information necessary to obtain and file a petition for decertification and refer the employees to legal counsel for assistance. *Vernon Manufacturing Co.* (1974) 214 NLRB 285; *Solar Aircraft Co.* (1954) 109 NLRB 130; *Moore Drop Forging Co.* (1954) 108 NLRB 32; *Consolidated Rebuilders* (1968) 171 NLRB 187. The Board attempts to reconcile this line of cases by distinguishing between "naming or suggesting an attorney" and "bringing the attorney and employees together." 7 ALRB No. 36, ALOD at 7. Such a distinction has no basis either in law or reason. The fact that an ABBATI representative arranged at the request of Cruz and Slovak for a convenient meeting place is not qualitatively different from referring an employee to another attorney's office. Indeed it seems ironic that the same board which so frequently emphasizes the unique needs of agricultural employees, is not willing to distinguish NLRB precedent because the Company arranged for the initial meeting since the worker lacked home telephone service.

Also unwarranted is the Board's assertion that ABATTI "gave a Christmas party at which Slovak circulated the decertification petition." 7 ALRB No. 36, ALOD at 7, fn. 8. There is no evidence in the record to indicate that the Christmas party referred to was Company sponsored nor did any of the post-hearing briefs make such a contention.

E. The Board's Findings Regarding ABATTI's Decision to Discontinue Its Rappini Crop Are Not Supported by Substantial Evidence and Conflict with Established Law.

The Board's attempt to establish a violation of the Act in the face of Supreme Court precedent directly in conflict with the ALO's Decision came as a complete surprise to Petitioners. The ALO found that the Company violated its duty to bargain over the decision, and relied heavily on the partial closure cases now overruled by *First National Maintenance Corp.* v. *NLRB* (1981) 101 S.Ct. 2573; *see* 7 ALRB No. 36, ALOD at 9. Proceeding on an *entirely new theory*, the Board found that ABATTI determined not to grow rappini exclusively or primarily as a means of "strike proofing." 7 ALRB No. 36, ALOD at 11. In turn, the Board found discriminatory motive based upon insufficient justification for what it termed a "preemptive layoff." *Id.* at 12. In doing so, the Board twisted the evidence and ABATTI's legal arguments beyond recognition.

Prior to the Board's ruling, neither any witness during the proceeding nor any party in argument had attempted to claim that ABATTI's sole or primary reason for discontinuing rappini was to "strike proof" the Petitioners' operation. An analysis of the entire record clearly indicates that the decision to discontinue the crop was economically motivated. Although ABATTI possessed valid concerns about continuing a labor intensive crop which was particularly susceptible to the danger of a strike in a highly volitile Imperial Valley of 1978, this was by no means the only reason for the Company's decision. When Ben Abatti put together the lack of financial success which the Company had enjoyed with the crop in recent years

together with other factors involved, he made an economic decision to terminate the crop. (II:21-23.)[20]

Thus, even a cursory reading of the Exceptions Brief indicates that the board's finding regarding strike proofing is simply not true. Although the susceptibility of the rappini crop to a strike was mentioned, ABATTI stated primarily economic grounds for its decision. (*See* Exceptions Brief at 140.)

The Board opinion implies that the decision to discontinue the rappini crop was motivated by a desire to discriminate against the Union and disenfranchise UFW supporters in the decertification election. This implication is easily pierced. First, it is permissible for ABATTI to be interested in seeing the decertification succeed if ABATTI engaged in no improper conduct with respect thereto. Secondly, the field workers who ultimately worked for Studer were still in the employ of ABATTI until the melon freeze in December, after the first two petitions had been filed by Cruz and Castellano. Additionally, under any interpretation of the record, ABATTI made the decision not to grow the rappini long before any decertification effort commenced. Finally, the workers who were allegedly eliminated were not known UFW supporters and ABATTI would have been merely guessing in eliminating them from qualification to vote in the election.

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[20] The Board purports to reach the conclusion that ABATTI's sole or primary motive for terminating crop was an attempt at strike proofing by relying upon ABATTI's Exceptions Brief, 7 ALRB No. 36, ALOD at 10. This conclusion completely misrepresents the substance of Petitioners' Brief. At page 40 of their brief, ABATTI sets forth the reason for the decision. At no time did Petitioners contradict their basic position that the decision was economically motivated. In a different section of the brief, Petitioners offered several alternative grounds for concluding that they did not have a duty to bargain over the decision. One of the alternative grounds was that given the likelihood of strikes in the Imperial Valley, the employer was justified in taking "defensive measures." This alternative argument was reasonably advanced in view of the uncertainties of the law prior to the Supreme Court's decision in *First Maintenance Corp.* (1981) 110 S.Ct. 2573, and can hardly be construed as a factual admission that "strike proofing" was the sole or primary cause of ABATTI's decision.

It is uncontradicted that ABATTI made its final decision to terminate the rappini operation long before the decertification effort got underway. The decision to discontinue the crop was first made in April, 1978. (II:31.) The land preparation, planting, fertilizing and cultivation took place under Studer's direction throughout the summer and fall of 1978. In September, 1978, Studer and ABATTI signed a contract whereby ABATTI would pack the rappini. (*See* G.C. Trial Exhibit 2.) The decertification drive was not initiated by Cruz and Castellano until November, 1978. As a result, the evidence does not support the Board's conclusion that the rappini crop was terminated to eliminate support for the Union in the decertification election.

If ABATTI was interested in discouraging UFW support by the termination of its rappini opration because of hostility towards rappini field employees, it is doubtful that ABATTI would have encouraged Albert Studer to hire these individuals. The only reason the employees were laid off by Petitioners was because of the December 5th melon freeze. (II:53-54.)

Perhaps the most compelling evidence that ABATTI did not intend to disenfranchise the rappini crop workers is the fact that it strenuously opposed the dismissal of the first decertification petition which was filed on December 6, 1978. Under Section 20352 of the ALRB regulations, voting eligibility is determined on the basis of the employer's payroll during the last complete payroll period, prior to the filing of the election. Since the decertification petition was filed on Tuesday, December 6, 1978, all of the employees laid off from the melon crew, including those who went to the rappini harvest, would have been eligible to vote. Yet, at the time of the ALRB's dismissal of the petition, ABATTI argued in a temporary restraining order proceeding that the December 6th eligibility period was appropriate for an election. The only reasonable conclusion is that ABATTI in no way attempted to disenfranchise the rappini employees.

Neither the ALO nor the Board pointed to any evidence indicating that the rappini workers were pro-union employees. The law is clear that before a finding can be made that an employer has discriminated against employees because of their union support, knowledge of their support must be shown by substantial evidence as opposed to inference, speculation, or coincidence. *See NLRB* v. *Shen Valley Meat Packers* (4th Cir. 1954) 211 F.2d 289; *Mantak Corporation* (1977) 231 NLRB 858; *Winn-Dixie Stores, Inc.* v. *NLRB* (4th Cir. 1971) 448 F.2d 8; *Hackett Precision Co.* v. *NLRB* (6th Cir. 1972) 459 F.2d 463. Accordingly, it is improper for the Board to conclude that ABATTI's motives in discontinuing the rappini crop were discriminatory.

In short, a decision to discontinue the rappini crop was made long before the commencement of the decertification campaign. Again, the Board has gone to great lengths to infer a causal link between conduct of ABATTI and the election although no such link exists.

F. The Board's Finding that Pro-union Abatti Employees Were Discriminatorily Discharged Is Not Supported by Substantial Evidence on the Basis of the Record Considered as a Whole.

The record as a whole, indicates that the layoffs were made necessary by an insufficiency of work and were not limited to union supporters. The layoffs were consistent with the seniority list utilized by the Company. The Board's conclusion that the use of seniority was merely "a device to lend plausablity" to the alleged discriminatory treatment of Fernandez, is pure speculation. 7 ARLB No. 36, ALOD at 13.

In determining whether or not there has been an illegal discharge and/or refusal to hire involving several discriminatees, the evidence regarding each of the individuals must be analyzed. *Sterling Aluminum Co.* v. *NLRB* (8th Cir. 1968) 391 F.2d 731. General Counsel clearly failed to meet such a burden as to each alleged discriminatee. *See Borg-*

Warner Controls (1960) 128 NLRB 1035. Similarly, the proof required must be more than mere suspicion or speculation and cannot be based upon inferences rather than proof. *Finmore Corp.*, 131 NLRB 557; *Interlake Iron Corp.* v. *NLRB* (7th Cir. 1942) 131 F.2d 129. In the case at bar, there is insufficient evidence to support the conclusion that the layoffs were either motivated by anti-union animus or sufficiently affected the results of the decertificaion election to warrant the remedy imposed.

G. The Board Abused Its Discretion by Applying Make-Whole Relief in Direct Contradiction of This Court's Holding in *J.R. Norton Company* v. *Agricultural Labor Relations Board* and Petitioner Has Been Denied Judicial Review of the Board's Abuse of Discretion.

On March 23, 1980, the ALO issued his 75-page recommended decision. Although the section entitled "Conclusion and Remedy" discussed several aspects of the remedy recommended by the ALO, it *did not mention* the make-whole remedy. Make-whole was mentioned *only* in the ALO's recommended order. Similarly, the Board's decision *did not discuss* any reasons for imposing make-whole. The Board's order merely provided, in pertinent part, that Petitioner must:

> "Make whole all agricultural employees employed by Respondent in the appropriate bargaining unit at any time during the period of December 27, 1978, to the date on which Respondent commences bargaining which results in a contract or a bona fide impasse, for all losses of pay or other economic losses they have incurred as a result of Respondent's refusal to bargain in . . . ." (7 ALRB No. 36 at 16-17).

In *J.R. Norton Company* v. *ALRB* (1979) 26 Cal.3d 1, this Court held that "the Act did not intend make-whole relief to be applied on an across-the-board basis." *Id.* at 38. Noting that

the ALRA authorizes make-whole relief "when the Board deems such relief appropriate," this Court concluded:

> "The words 'when the Board deems such relief appropriate,' according to [Secretary Bird's] testimony, were intended to convey the notion that the Board must carefully evaluate the asserted grounds for ordering make-whole relief; *such an evaluation necessarily requires the Board to examine the facts and equities of each particular case.* Thus, the legislative history reveals the Act did not intend make-whole relief to be applied on an across-the-board basis." (*Id.*; emphasis added.)

The record in this case is barren of any indication that the ALRB "carefully evaluate[d] the asserted grounds for ordering make-whole relief" as required by *J.R. Norton.* Indeed, no "grounds" for make-whole relief were even "asserted" by the ALO or the Board. Such relief was simply ordered *as a matter of course,* apparently "on an across-the-board basis." The administrative record thus indicates that the ALRB failed to exercise the discretion required under *J.R. Norton* in applying the make-whole remedy.

It is a well-established principle that an administrative agency is required to provide a reasoned basis for the exercise of its discretion. In *Phelps Dodge Corp.* v. *N.L.R.B.* (1941) 313 U.S. 177, 8 LRRM 439, the United States Supreme Court determined that the National Labor Relations Board ("NLRB") abused its discretion in failing to articulate the basis for its granting of a discretionary reinstatement remedy. The Court stated:

> "Thus the Board determined only the dry legal question of its power, which we sustain; it did not consider whether in employing that power the policies of the Act would be enforced . . . . From the record of the present case we cannot really tell why the Board has ordered reinstatment of the strikers who obtained subsequent employment . . . . The administrative process will best be

> vindicated by clarity in its exercise . . . it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order." 8 LRRM at 447.

Phelps Dodge stands for the proposition that, even if the ALRB could appropriately have exercised its discretion in awarding make-whole relief in this case, its failure to "disclose the basis of its order" precludes the enforcement of that order. *See also Bob's Big Boy Family Restaurants* v. *N.L.R.B.* (9th Cir. 1980) 104 LRRM 3169, 3171; *Hecla Mining Co.* v. *N.L.R.B.* (9th Cir. 1977) 564 F.2d 309, 313, 96 LRRM 3340. *See generally, F.T.C.* v. *Sperry & Hutchinson Co.* (1972) 405 U.S. 233, 249-250. In this case, the Board explained neither the basis for its remedy nor its reason for disregarding the binding precedent established by this Court.

In its brief to the appellate court, the Board contended that the *J.R. Norton* standard for imposing make-whole relief might not apply "in a decertification context wherein an employer refuses to bargain *prior* to the Board's determination as to the validity of the election." ALRB Brief at 51 (emphasis in original). The Board contended:

> "However, *following* issuance of the instant decision, the Board, in *Nish Noroian,* (1982) 8 ALRB No. 25 . . . *articulated a test for cases such as this one* . . . ." *Id.* (Emphasis added; footnote omitted.)

The Board proceeded to argue that, under the *Nish Noroian* "test," make-whole was appropriate in this case. Inasmuch as the validity of the *Nish Noroian* "test"—which which the ALRB cites controlling—is presently being reviewed by the very appellate court which denied review in this case (4 Civil No. 27889; oral argument heard March 1, 1983), application of *that* standard to *this* Petitioner, coupled with summary denial of this Petitioner's attempts to secure judicial review, denies this Petitioner due process of law.

H. Even if ABATTI is Found to have Committed Unfair Labor Practices in Connection With the Decertification Election, the Board's Bargaining Order is Improper.

Under the NLRA, a bargaining order would be improper given the facts of this case. The NLRB is unwilling to impose such an extreme remedy absent serious unfair labor practices which interfere with the election process and preclude the holding of a fair election. *See NLRB* v. *Gissel Packing Co.* (1969) 395 U.S. 575. Accordingly, isolated threats and illegal interrogations will not overtun an election result. *Cameo Lingerie, Inc.* (1964) 148 NLRB 535; *Hammon & Irving, Inc.* (1965) 154 NLRB 1071.

In *Daisy's Originals, Inc. of Miami* v. *NLRB* (5th Cir. 1972) 468 F.2d 493, the court concluded that the employer had engaged in a "subtle campaign . . . to increase dissention in the shop and weaken the union's bargaining power." *Id.* at 498. Promises were made to increase benefits, in contravention of Section 8(a)(1) of the Act. *Id.* Nevertheless, no bargaining order was issued after the union's defeat in the election. The court concluded that only outrageous and pervasive unfair labor practices would support a bargaining order. *Id.* at 500. Conversely, it was held that the Board is not authorized to enter a bargaining order where the unfair labor practices had a "minimal impact" on the election machineries such that an election could be held. *Id.*

The bargaining order entered in the instant case is inappropriate. There is absolutely no causal link shown between the conduct allegedly engaged in by the Petitioners and the outcome of the election. Given the Board's reluctance to overturn representation elections won by the UFW, and its attempts to distinguish NLRB precedent in this regard because of the "unique needs of agricultural workers," the refusal to recognize the clear mandate of ABATTI employees in this instance is inexplicable. Indeed, the isolated unfair labor pactices alleged in this case were not so pervasive as to justify the setting aside of a free election in a diversified unit the size of

ABATTI. The workers voted in the privacy of an election booth. To disregard their vote is to make a mockery of the ALRA and to return labor relations in California to the undemocratic chaos out of which the ALRA was born.

I. The Court of Appeals' Refusal to Review and Decide This Case Violates the Mandate of Labor Code Section 1160.8 and Article VI. Section 14 of the California Constitution.

In summarily denying without reasons Petitioner's request for review, the Court of Appeal acted in excess of the jurisdiction conferred it under Labor Code Section 1160.8. That section mandates the commission of a judicial act — enforcement, modification or setting aside of the Board's order — and thus requires a judicial determination of the case. As such, a written decision with reasons stated is constitutionally required. (Cal. Const. Art. VI § 14.)

Such exercise of jurisdiction is further mandated by Article III, Section 3.5 of the California Constitution, which denies to agencies full adjudicatory authority over causes.

This case presents significant issues left unanswered by the court in its decision in *Tex-Cal Land Management, Inc.* v. *ALRB* (1979) 24 Cal.3d 335. In *Tex-Cal*, the court faced the issue of whether judicial review of ALRB decisions under Labor Code Section 1160.8 should be conducted in the same manner as ordinary appeals. The court held, as a matter of statutory interpretation, that the review jurisdiction conferred by the Labor Code Section 1160.8 was more in the nature of a writ proceeding. The court was not presented with, and did not consider, the constitutional ramifications of lower court interpretations of *Tex-Cal* as authorizing summary denial of petitions for review.

Labor Code Section 1160.8 confers a specific jurisdiction on courts of appeal presented with requests to review ALRB decisions. It mandates that the court exercise jurisdiction and obtain the record. The court is then mandated to do one or

more of the following: (1) grant temporary relief to the Board; (2) enforce the Board order; (3) modify the Board order and enforce as modified; or (4) set aside in whole or in part the order of the Board. The court is not given discretion to refuse the order. It is not given discretion to refuse to consider the legality and enforceability of the Board's order. It is mandated to perform acts of judicial review and adjudication, leading either to enforcement or setting aside of the order. It is mandated to determine the cause before it.

No jurisdiction is conferred on the court of appeal to refuse this unambiguous statutory mandate.

A consequence of this statutory mandate to determine the enforceability of the order before it is that the court is required to determine the cause before it and therefore must issue a written decision with reasons stated. (Cal. Const. Art. VI § 14.)

To be sure, it appears settled that appellate court denial without opinion of ordinary petitions for a writ of mandate or prohibition directed to a lower constitutional court, without more, is not the determination of a "cause" requiring oral argument and written opinion. (*People* v. *Medina* (1972) 6 Cal.3d 484, 490, and cases there cited.) Each of these cases deals with summary denials of writs to constitutional courts. (Cal. Const. Art. VI § 1.) Their rationale is that terming the summary denial a determination of the "cause" would prejudice a full adjudication of the issue in a subsequent appeal and allow appellate courts to "evade the state constitutional requirement of written opinions." (*People* v. *Medina*, *supra*, 6 Cal.3d at p. 490.) Moreover, summary denial is not ordinarily res judicata. (*Id.*, at p. 491, fn. 6.)

In the case at bar, the jurisdiction conferred on the courts of appeal is jurisdiction to decide—to enforce, modify or set aside. The action directed is adjudicatory, and assumedly would be given res judicata effect. As such, written opinions are required.

Moreover, unlike *Medina*, ALRB orders issue from a non-constitutional court. The Policy of *Medina*—to preserve full appellate court review on appeal—simply does not apply. Review by courts of appeal of ALRB orders is the one and only opportunity for petitioner to have the merits of its case presented to a constitutional judge. Summary denial thus does not aid jurisdiction—it ends it.

Petitioner submits that the broad discretion conferred appellate courts to summarily deny prerogative writs does not apply to ALRB orders and permit summary denial of their review. Cases enunciating this broad discretion generally deal with pretrial writs addressed to constitutional courts, and suggest denial is proper unless the issue raised is one of first impression and general importance. (*See Pac. Tel. & Tel. Co.* v. *Superior Court* (1970) 2 Cal.3d 161, 169.) In those cases denial will not preclude litigants from later review on appeal. Here, summary denial ends the one and only chance for involvement by a constitutional court in assessing the legality of ALRB action. Petitioner is turned away without having some judge, somewhere, say to it: "That which was done was properly done." As noted in *People* v. *Pacini* (1981) 120 Cal.App.3d 877:

> "The importance of a written opinion as a prerequisite to a decision sufficiently matured to determine a law of the case has been emphasized in both prerogative writ and habeus corpus writ cases." (at p. 884.)

* * *

> "Without an opinion it is not possible to determine what merits were resolved by the Fifth District decision." (at p. 886.)

The court concluded that summary denial did not create law of the case or res judicata effect. That appellate courts are mandated to adjudicate the cause to the point of res judicata

effect under Labor Code Section 1160.8 is clear from its mandate that in subsequent enforcement actions in Superior Court the Superior Court may not rule on the merits of the order.

Thus, summary denial fails to accomplish the statutory mandate of final adjudication. It also denies to litigants and the public a method by which they will be able to "discern the decision and legal reasoning" of the court. (*People* v. *Ford* (1981) 30 Cal.3d 209, 219 [Bird, C.J., dissenting].) As the Chief Justice rhetorically asked:

> "How can the public know what the other issues were and how they were decided? How do future litigants cite the decision in this case?" (*Id.*)

J. Unless This Court Grants a Hearing or Mandates the Court of Appeal to Conduct a Proper Judicial Review of the Case, Petitioner Will Have Been Deprived of Property Without a Constitutional Judge Ever Provably Hearing Its Claim. As Such, Labor Code Section 1160.8 as Construed by This Court in Tex-Cal and Applied in This Case Will Be Rendered Unconstitutional Under Article I, Section 7 of the California Constitution and the Fourteenth Amendment to the United States Constitution.

If the mandate of Labor Code Section 1160.8 is not followed, the ALRA will be unconstitutional under the California and federal due process clauses as applied in this case.

Petitioner does not challenge Labor Code Section 1160.8 on its face, for it clearly provides for a constitutionally sufficient adjudication on the merits, with written reasons therefor. If construed to allow unfettered and undocumented discretion to the court of appeal to refuse to decide the case, however, the scheme allows a star chamber proceeding abhorrent to due process.

While a state is not required to provide appellate review of adjudications of its constitutional courts (*Griffin* v. *Ill* (1956)

351 U.S. 12), all states, including California, recognize the importance of appellate review in adjudicating deprivations of liberty. (*Id.*) No meaningful distinction exists as to deprivations of property.

Petitioner's property at issue is the make-whole award which may run into the several millions of dollars.

On this record, it cannot be said that a constitutional judge has ruled that the taking is legal. No further judicial review is possible. (Labor Code § 1160.8.) Thus, taking is effectuated without a record demonstrating that a constitutional judge ever passed on the merits.

Due process requires that one be free from "arbitrary adjudicative procedures." (*People* v. *Ramirez* (1979) 25 Cal.3d 260.) Such freedom is a substantive element of one's liberty. (*Id.*)

> "The essence of the concept of due process is fair play, and central to our legal and social system is the idea that if an interest being defended is of value, the defendant ought to have his 'day in court' and and the opportunity to be heard." (*Mihans* v. *Muni. Court* (1970) 7 Cal.App.3d 479.)

Due process requires that some judge, somewhere, pass on the legality of a deprivation of property before it may be accomplished. If the summary denial mechanism is allowed to stand, the only body provably adjudicating the dispute will be the ALRB. ALRB action, alone, is insufficient.

Whether the ALRB has been vested with constitutional authority to adjudicate disputes seems still to be an unresolved issue. In *Perry Farms* v. *ALRB* (1978) 86 Cal.App.3d 448, *hrg. den.* (1979), the court observed that under Cal. Const. Art. XIV § 1 the legislature "may" confer constitutional judicial power on agencies. Such conferral appears to be embodied in constitutional and statutory provisions concerning the Public

Utilities Commission and Worker's Compensation Appeals Board. No comparable constitutional or statutory mechanisms govern the ALRB.

Whether or not the ALRB is a constitutional court, some judicial review is constitutionally compelled. *Perry Farms* upheld the ALRA against broad constitutional attack relying explicitly on the availability of judicial review of ALRB decisions. *Perry* held that the rule of review of ALRB decisions was the same as that accorded to NLRB decisions under *Universal Camera Corp.* v. *Labor Board* (1951) 340 U.S. 474. There, the U.S. Supreme Court set forth the standards for judicial review of the NLRB, all of which presumed full hearings with written opinions.

Tex-Cal, supra, did not expressly disavow the *Universal Camera* standard in ALRB reviews. If it is read or applied as so doing, the very mechanism whereby *Perry* found the ALRA constitutional will have been written out of the statute.

In *NLRB* v. *Jones & Laughlin Steel Corp.* (1936) 301 U.S. 1 the court upheld the NLRA against due process attack, on the basis that effective appellate review was available before NLRB decisions could be enforced:

> "The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action . . . ." (301 U.S. at p. 47.)

Failure to require such review renders the ALRA unconstitutional. The very underpinnings of constitutionality—effective judicial review—will have been written out of the Act. Clearly, the ALRB—even if possessing constitutional

adjudicative authority—cannot be the sole arbitrator of property deprivation. It cannot adjudicate constitutional questions. Its judicial authority is limited. (Cal. Const. Art. III § 3.5.)

Moreover, the ALRB is vested with a statutory mandate to enforce labor laws. It does not alone possess the neutrality constitutionally necessary for deprivations of property. (*Gerstein* v. *Pugh* (1975) 420 U.S. 103.) Involvement, at some stage, of a judicial officer is necessary. (*Id.*) The legislature cannot place protection of liberty and property beyond the review of the courts. (*Walker* v. *Hughes* (6th Cir. 1977) 558 F.2d 1247.)

The extent to which a state may commit to administrative agencies unreviewable authority to restrict pre-existing rights is "one of the great questions of constitutional law . . . ." (*Ortwein* v. *Schwab* (1973) 410 U.S. 656, 666 [Marshall, J., dissenting].) As stated by Mr. Justice Brandeis:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." (*St. Joseph Stock Yards Co.* v. *United States* (1935) 298 U.S. 38, 84 [concurring opinion].)

Accord: Jaffe, *The Right to Judicial Review II* (1958) 71 Harv. L. Rev. 759, 803.

Because of the extreme importance of these issues we request that this court grant the Petition for Hearing, and eliminate the constitutional defect by mandating meaningful review under Labor Code Section 1160.8.

IV

CONCLUSION

For each of the reasons set forth above, General Counsel failed to establish by a preponderance of the evidence that the Petitioners violated the Act. Moreover, the imposition of a bargaining order and make-whole remedy are entirely inappropriate. As a result, ABATTI respectfully submits that the alleged unfair labor practice charges be dismissed and that the decertification election results be upheld.

DATED: _____, 1983

Respectfully submitted,

GRAY, CARY, AMES & FRYE

By: _____

RICHARD A. PAUL
MERRILL F. STORMS, JR.
Attorneys for Petitioners
ABATTI FARMS, INC. and
ABATTI PRODUCE, INC.

DECLARATION OF SERVICE BY MAIL

I, VIRGINIA L. FORSHEY, declare:

That declarant is a citizen of the United States, over 18 years of age, a resident of and employed in the County of San Diego, State of California, and not a party to the within action.

That declarant's business address is 2100 Union Bank Building, 525 B Street, San Diego, California 92101.

That declarant served the attached PETITION FOR HEARING by placing a true copy thereof in envelopes addressed to the following:

Executive Secretary, ALRB
915 Capitol Mall, 3rd Floor
Sacramento, CA 95814

Regional Office, ALRB
319 Waterman
El Centro, CA 92243

UFW
Legal Department
Appellate Division
1201 24th Street
Sacramento, CA 95816

ALRB
General Counsel
915 Capitol Mall, 3rd Floor
Sacramento, CA 95814

UFW
P.O. Box 30, La Paz
Keene, CA 93531

Clerk of Court of Appeals
Fourth Appellate District
1350 Front Street
San Diego, CA 92101

Said envelopes were then sealed and postage fully prepaid thereon, and thereafter were on March 14, 1983 deposited in the United States mail at San Diego, California. That there is delivery service in the United States at the place so addressed, or regular communications by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 14, 1983 at San Diego, California.

Virginia L. Forshey

APPENDIX E

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

May 4, 1983

I have this day filed Order

HEARING DENIED

In Re: 4 Civ. No. 26468

ABATTI FARMS INC.

vs.

Agricultural Labor Relations Bd.,
United Farm Workers of America, AFL-CIO

Respectfully,

Clerk

27074-877 8-82 4M *
OSP

APPENDIX F

CUMULATIVE ALRB LITIGATION RESULTS
(As of May 11, 1983)

			ALRB[1] Upheld	Mixed Result	Adverse Ruling
U.S. SUPREME COURT					
	1.	Kubo and Pandol v. ALRB (1976) 429 U.S. 802			1
U.S. COURT OF APPEALS					
o[2]	1.	Cel-A-Pak v. ALRB (1978)			1
po	2.	Cel-A-Pak v. ALRB (1982) 680 F.2d 664			1
U.S. DISTRICT COURTS					
	1.	Encinitas Floral v. ALRB (1975)			1
o	2.	Dodd v. ALRB (1975)			1
	3.	Perry v. ALRB (1976)			1
o	4.	Borchard v. ALRB (1977)			1
o	5.	Cel-A-Pak v. ALRB (1977)			1
o	6.	Cel-A-Pak v. ALRB (1979)			1
o	7.	Western Growers Assoc. v. Brown (1980)			1

[1] The "ALRB Upheld" heading indicates cased in which the Board's position has been affirmed by the courts. This includes cases in which the courts have summarily denied petitions for review of Board orders. "Mixes Result" includes those cases in which a court has—either by its judgment or by its rationale—given partial approval to the Board's reasoning and/or to the result sought by the Board, while rejecting other aspects of the Board's position. This category includes petition for review cases in which the Board's final order was only partially enforced. "Adverse Ruling" indicates cases in which the Board's position has been rejected.

[2] "o" indicates that an opinion issued; "po" indicates a published opinion; "t" indicates that petition for review was denied because it was not timely filed.

			ALRB[1] Upheld	Mixed Result	Adverse Ruling
CALIFORNIA SUPREME COURT					
po	1.	ALRB v. Superior Ct. (1976) 16 Cal.3d 392	1		
po	2.	Belridge Farm v. ALRB (1978) 21 Cal.3d 551	1		
po	3.	Vargas v. Municipal Ct. (1978) 22 Cal.3d 902 (amicus)		1	
po	4.	Tex-Cal Land Mgmt v. ALRB (1979) 24 Cal.3d 335 (3:14)[3]	1		
po	5.	J.R. Norton v. ALRB (1979) 26 Cal.3d 1 (4:39)		1	
po	6.	Kaplan's Fruit & Produce v. Superior Ct. (1979) 26 Cal.3d 60 (amicus)		1	
po	7.	Sam Andrews' Son v. ALRB (1981) 28 Cal.3d 781 (3:45)	1		
po	8.	Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307 (3:91)	1		
po	9.	Martori Bros. v. ALRB (1981) 29 Cal.3d 721 (5:47)		1	
po	10.	San Clemente Ranch v. ALRB (1981) 29 Cal.3d 874 (5:54)	1		
po	11.	Highland Ranch v. ALRB (1981) 29 Cal.3d 848 (5:54)		1	
po	12.	ALRB v. California Coastal Farms (1982) 31 Cal.3d 469	1		
po	13.	Kaufman v. Court of Appeal (1982) 31 Cal.3d 933			1
CALIFORNIA COURT OF APPEAL					
(a) NOW PENDING IN SUPREME CT.[4]					
	1.	Triple E Produce v. ALRB (1982)(6:46)			[1]
	2.	Rivcom Corp v. ALRB (1982) (5:55)			[1]

[3] The notation "3:14" indicates that the case concerns Board decision 3 ALRB No. 14.

[4] The granting of a hearing by the California Supreme Court vacates a Court of Appeal decision. The now-vacated Court of Appeal result for each case now pending in the Supreme Court is indicated in brackets, and is not included in the totals.

			ALRB Upheld	Mixed Result	Adverse Ruling
(b)	GENERAL CASES DECIDED				
o	1.	Mahony v. Superior Ct. (Corda) (1975)	1		
	2.	Bacchus Farms v. ALRB (1976).	1		
	3.	Andrews v. ALRB (1977)	1		
	4.	Mt. Arbor Nurseries v. ALRB (1977)	1		
po	5.	Nishikawa Farms v. Mahony (1977) 66 Cal.App.3d 781	1		
	6.	Howard Rose v. ALRB (1977)...	1		
o	7.	Superior Farming v. Mahony (1977)	1		
o	8.	White River Farms v. Mahony (1977)	1		
po	9.	Cesare & Sons v. ALRB (1977) 72 Cal.App.3d 36 (hg. den.)[5].....	1		
	10.	Radovich v. ALRB (1977) 72 Cal.App.3d 36 (hg. den.)	1		
po	11.	UFW v. Superior Ct. (Mt. Arbor Nurseries) (1977) 72 Cal.App.3d 268 (amicus)	1		
	12.	Nish Noroian v. Superior Court (ALRB) (1978).....	1		
po	13.	People v. Medrano (1978) 78 Cal.App.3d 198 (amicus)		1	
o	14.	ALRB v. Henry Moreno (1978).		1	
o	15.	ALRB v. Superior Ct. (Laflin) (1978) (hg. den.)			1
po	16.	ALRB v. Laflin & Laflin (1979) 89 Cal.App.3d 651 (hg. den.)			1
	17.	Bonita Packing Co. v. ALRB (1979) (4:96)	1		
po	18.	Cadiz and Caratan v. ALRB (1979) 92 Cal.App.3d 365 (hg. den.) (4:68)			1

[5] "Hg. den." indicates that a hearing was denied by the California Supreme Court.

			ALRB Upheld	Mixed Result	Adverse Ruling
po	19.	Dessert Seed Co. v. Brown (1979) 96 Cal.App.3d 69		1	
	20.	Franzia Bros. Winery v. ALRB (1979) (4:100)	1		
po	21.	San Diego Nursery v. ALRB (1979) 100 Cal.App.3d 128		1	
po	22.	Yamada Bros. v. ALRB (1979) 99 Cal.App.3d 112			1
o	23.	ALRB v. S. Kuramura, Inc. (1979) (3:49)	1		
	24.	Royal Packing v. ALRB & UFW (1980)	1		
	25.	E. & J Gallo Winery v. Superior Court & ALRB (1980) (5:57)	1		
	26.	C. Mondavi v. ALRB (1980) (3:65)	1		
	27.	ALRB v. UFW (Clyde Cornell) (1980)	1		
po	28.	California Coastal Farms v. ALRB (1980)	1		
po	29.	ALRB v. Ruline Nursery (1981) 115 Cal.App.3d 1005	1		
po	30.	California Coastal Farms v. Doctoroff (1981) 117 Cal.App.3d 156	1		
	31.	Steak Mate v. Superior Court (1981)	1		
o	32.	ALRB v. Bruce Church, Inc. (1981)			1
	33.	ALRB v. Superior Court (Castle Farms) (1981)[6]		1	
po	34.	Banales v. Municipal Court (1982) 132 Cal.App.3d 67 (amicus) (hg. den.)		1	

[6] Writ of Mandate denied for express reasons that remedy by appeal was adequate.

			ALRB Upheld	Mixed Result	Adverse Ruling
po	35.	Thomas Castle Farms v. ALRB (1983) 140 Cal.App.3d 668 (hg. den.)	1		
(c)	PETITIONS FOR REVIEW DECIDED				
	1.	S. Kuramura, Inc. v. ALRB (1977) (hg. den.) (3.49)	1		
	2.	Rod McLellan v. ALRB (1977) (hg. den.) (3.71)	1		
	3.	Hemet Wholesale v. ALRB (1977) (3:47)	1		
t	4.	UFW v. ALRB (Kyotoku) (1977) (3:30)	1		
t	5.	Frudden Produce/Whitney Farms v. ALRB (1977) (3:68)	1		
po(t)	6.	UFW v. ALRB (Robert S. Andrews) (1977) 74 Cal.App.3d 347 (3:45)	1		
po(t)	7.	Jackson & Perkins v. ALRB (1978) 77 Cal.App.3d 830 (3:36)	1		
o	8.	Arnaudo v. ALRB (1978) (3:78)	1		
t	9.	American Foods v. ALRB (1978) (4:49)	1		
	10.	UFW v. ALRB (Baillie) (1978) (3:85)	1		
	11.	Adam Farms v. ALRB (1978) (4:12)	1		
o	12.	Sacramento Nursery Growers, Inc. (1978) (3:94)	1		
po	13.	Perry Farms v. ALRB (1978) 86 Cal.App.3d 448 (hg. den.) (4:25)			1
	14.	O.P. Murphy v. ALRB (1979) (hg. den., cert. den)[7] (4:106)	1		
	15.	Ron Nunn Farms v. ALRB (1979) (hg. den.) (4:34)	1		

[7] "Cert. den." indicates that certiorari was denied by the U.S. Supreme Court.

		ALRB Upheld	Mixed Result	Adverse Ruling
16.	Dave Walsh Co. v. ALRB (1979) (hg. den.) (4:84).....	1		
17.	Martori Bros. v. ALRB (1979) (hg. den.) (4:80).....	1		
18.	Merzoian Bros. v. ALRB (1979) (3:62).....	1		
19.	San Diego Nursery v. ALRB (1979) (hg. den.) (4:93).....	1		
20.	John Elmore, Inc. v. ALRB (1979) (hg. den.) (4:98).....	1		
21.	Garin Company v. ALRB (1979) (hg. den.) (5:4).....	1		
22.	Bertuccio Farms v. ALRB (1979) (hg. den.) (5:5).....	1		
23.	Prohoroff Poultry Farms v. ALRB (1979) (hg. den.) (5:9)..	1		
24.	Nagata Bros. v. ALRB (1979) (hg. den., cert. den.) (5:39)	1		
25.	Mario Saikhon, Inc. v. ALRB (1979) (5:44).....	1		
26.	Bruce Church, Inc. v. ALRB (1979) (hg. den.) (5:45).....	1		
27.	S & F Growers v. ALRB (1979) (5:50).....	1		
28.	Dutch Bros. v. ALRB (1979) (3:80).....	1		
29.	Robert H. Hickam v. ALRB (1979) (4:73).....	1		
30.	Belridge Farms v. ALRB (1979) (hg. den.) (4:30).....	1		
31.	McCoy's Poultry v. ALRB (1979) (hg. den.) (4:15).....	1		
32.	Marshburn Farms v. ALRB (1979) (4:99).....	1		
33.	Sunnyside Nurseries v. ALRB (1979) 93 Cal.App.3d 922 (hg. den.) (3:42).....			1

			ALRB Upheld	Mixed Result	Adverse Ruling
po	34.	Pandol & Sons v. ALRB (1979) 98 Cal.App.3d 580 (3:29).....		1	
po	35.	Butte View Farms v. ALRB (1979) 95 Cal.App.3d 961 (4:90).....	1		
	36.	Santa Clara Farms v. ALRB (1980) (5:67).....	1		
	37.	Jesus Martinez v. ALRB (1980) (5:51).....	1		
	38.	Security Farms v. ALRB (1980) (4:67).....	1		
po	39.	Royal Packing Co. v. ALRB (1980) 101 Cal.App.3d 826 (5:31).....		1	
t	40.	Oceanview Farms v. ALRB (1980) (hg. den.) (5:71).....	1		
o	41.	Dan Tudor v. ALRB (1980) (3:69).....			1
o	42.	Mel-Pak Ranches v. ALRB (1980) (4:78).....			1
	43.	C. Mondavi v. ALRB (1980) (hg. den.) (4:52).....	1		
	44.	Superior Farming Co. v. ALRB (1980) (5:6).....	1		
	45.	Adam Dairy v. ALRB (1980) (4:24).....	1		
	46.	D'Arrigo Bros. v. ALRB (1980) (hg. den.) (4:45).....	1		
	47.	Kaplan's Fruit & Produce v. ALRB (1980) (hg. den.) (5:40)	1		
	48.	M. Caratan, Inc. v. ALRB (1980) (5:16).....	1		
	49.	Tenneco West, Inc. v. ALRB (1980) (hg. den.) (3:92).....	1		
	50.	Tenneco West, Inc. v. ALRB (1980) (hg. den.) (4:16).....	1		
	51.	M. Caratan v. ALRB (1980) (4:83) (6:14).....	1		

			ALRB's Upheld	Mixed Result	Adverse Ruling
po	52.	Prohoroff Poultry Farms v. ALRB (1980) 107 Cal.App.3d 622 (hg. den.) (3:87)			1
po	53.	Kawano, Inc. v. ALRB (1980) 106 Cal.App.3d 937 (hg. den.) (4:104)	1		
	54.	C. Mondavi & Sons v. ALRB (1980) (5:53)	1		
po	55.	Abatti Farms, Inc. v. ALRB (1980) 107 Cal.App.3d 937 (hg. den.) (5:34)			1
	56.	Frank Lucich Co., Inc. (1980) (4:89)	1		
	57.	Tex-Cal Land Mgmnt., Inc. (1980) (5:29)	1		
	58.	Pappas & Co. (1980) (hg. den.) (5:52)	1		
	59.	AS-H-NE Farms, Inc. (1980) (hg. den.) (6:9)	1		
	60.	Louis Caric & Sons (1980) (4:108)	1		
	61.	High & Mighty Farms (1980) (hg. den.) (6:34)	1		
po	62.	George Arakelian Farms, Inc. (1980) 111 Cal.App.3d 258 (5:10)			1
	63.	Louis Caric (1980) (6:2)	1		
	64.	O.P. Murphy Produce (1980) (hg. den.) (5:63)	1		
	65.	High & Mighty Farms (1980) (6:34)	1		
	66.	Jack Bros. & McBurney (1980) (hg. den.) (6:12)	1		
	67.	California Coastal Farms (1980) (hg. den.) (6:25)	1		

			ALRB Upheld	Mixed Result	Adverse Ruling
po	68.	Merrill Farms (1980) 113 Cal.App.3d 176 (hg. den.) (5:58)			1
	69.	Kyutoku Nursery, Inc. (1980) (hg. den.) (4:55; 6:32)	1		
po	70.	Jasmine Vineyards (1980) 113 Cal. App.3d 968 (3:74; 6:17)	1		
	71.	J.R. Norton (1981) (hg. den.) (6:26)	1		
po	72.	M.B. Zaninovich (1981) 141 Cal.App.3d 665 (4:70)		1	
	73.	Sam Andrews' Sons (1981) (6:44)	1		
o	74.	Sunnyside Nurseries, Inc. (1981) (hg. den.) (5:23)	1		
	75.	Miranda Mushroom, Inc. (1981) (hg. den.) (6:22)	1		
	76.	C. Mondavi (1981) (hg. den.) (6:30)	1		
	77.	J & L Farms (1981) (hg. den.) (6:43)	1		
po	78.	Montebello Rose (1981) 119 Cal.App.3d 1 (hg. den.) (5:64)	1		
	79.	Charles Malovich (1981) (6:29)	1		
	80.	Associated Produce (1981) (6:54)	1		
	81.	Bee & Bee Produce v. ALRB (1981) (hg. den.) (6:48)	1		
	82.	UFW v. ALRB (Bee & Bee Produce) (1981) (6:48)	1		
	83.	UFW v. ALRB Kaplan's Fruit & Produce (1981) (6:36)	1		
o	84.	Eto v. ALRB (1981) (6:20) (hg. den.)		1	
	85.	Ron Nunn v. ALRB (1981) (6:41)	1		

		ALRB Upheld	Mixed Result	Adverse Ruling
86.	Tenneco West v. ALRB (1981) (6:53)	1		
87.	Holtville Farms v. ALRB (1981) (7:15) (hg. den.)	1		
88.	Arnaudo Bros. v. ALRB (1982) (7:25)	1		
89.	Kawano, Inc. v. ALRB (1982) (7:16)	1		
90.	McFarland Rose v. ALRB (1982) (6:18)	1		
91.	Ranch No. 1 v. ALRB (1982) (6:37) (hg. den.)	1		
92.	Verde Produce v. ALRB (1982) (7:27) (hg. den.)	1		
93.	Guimarra Vineyards v. ALRB (1982) (7:7)	1		
94.	Pacific Mushroom V. ALRB (1982) (7:28)	1		
95.	Bertuccio v. ALRB (1982) (81-CL-20-SAL)	1		
96.	Tex-Cal v. ALRB (1982) 135 Cal.App.3d 906 (7:11)			1
97.	Arakelian Farms. v. ALRB (1982) (8:32)	1		
98.	Neuman Seed Co. v. ALRB (1982) (7:35) (hg. den.)	1		
99.	Merrill Farms v. ALRB (1982) (8:4)	1		
100.	Martori Farms v. ALRB (1982) (8:23) (hg. den.)	1		
101.	Lawrence Scarrone v. ALRB (1982) (7:13)	1		
102.	Royal Packing v. ALRB (1982) (8:17)	1		
103.	Bertuccio Farms v. ALRB (1982) (8:6) (hg. den.)	1		

		ALRB Upheld	Mixed Result	Adverse Ruling
104.	J & L Farms v. ALRB (1982) (8:46)	1		
105.	San Clemente Ranch v. ALRB (1982) (8:29)	1		
106.	Bertuccio Farms v. ALRB (1983) (8:39) (hg. den.)	1		
po(t)107.	Mario Saikhon v. ALRB (1983) 140 Cal.App.3d 581 (8:88) (hg. den.)	1		
108.	Abatti Farms v. ALRB (1983) (7:36) (hg. den.)	1		
109.	Kophammer Farms v. ALRB (1983) (8:21)	1		
po 110.	Nish Noroian Farms v. ALRB (1983) ___Cal.App.3d___ (8:25)		1	

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U.S. Supreme Court	1	—	—
U.S. Court of Appeals	2	—	—
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California Court of Appeal	120	14	10
(a) Now Pending in Supreme Court[8]	—	—	[2]
(b) General Cases Decided	(24)	(6)	(5)
(c) Petitions for Review Decided	(96)	(9)	(5)
GRAND TOTAL	143	20	11

[8] See footnote 4.

SUPREME COURT, U.S.
FILED
OCT 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-190

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

ABATTI FARMS, INC. and
ABATTI PRODUCE, INC.

Petitioners,

v.

AGRICULTURAL LABOR RELATIONS BOARD and
UNITED FARM WORKERS, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF IN OPPOSITION OF RESPONDENT AGRICULTURAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether in the absence of any claim that the procedures before the Agricultural Labor Relations Board were constitutionally deficient, petitioner raises a substantial federal question by objecting only to the state procedure which permitted the California Court of Appeal to dispose of Abatti's petition for review of the Board's decision without opinion?

STATEMENT OF THE CASE

Petitioners Abatti Farms, Inc. and Abatti Produce, Inc. (hereinafter, "Abatti") are California corporations and are agricultural employers subject to the jurisdiction of the Agricultural Labor Relations Board ("ALRB" or "Board"). The United Farm Workers of America, AFL-CIO ("UFW") was duly certified by the ALRB as collective bargaining representative of Abatti's agricultural employees. Subsequent to such certification, on June 7, 1978, Abatti and the UFW entered into a collection bargaining agreement. (Pet. App. A, p. 5.)[1] About six months later, on December 27, 1978, an election was held to decertify the UFW as the collective bargaining representative. (*Ibid.*)

Based upon unfair labor practice charges filed by the UFW, the Board's General Counsel issued an administrative complaint alleging, in substance, that Abatti had instigated, supported, and assisted the decertification campaign; had discriminated against certain employees because of their support for the UFW; had unilaterally discontinued a rapini crop without bargaining over the decision; and had refused to bargain with the UFW. Following an extensive hearing, an administrative law judge (ALJ) issued his recommended decision. After considering the ALJ's report and Abatti's exceptions thereto, the Board issued its Decision and Order. (7 ALRB No. 36; Pet. App. A.)

In substance, the Board found that there was insuffi-

[1] Reference is to petitioner's Appendix.

cient evidence to support a conclusion that Abatti had instigated the decertification petition, but found that ample evidence supported the General Counsel's allegation that Abatti supported and assisted the decertification effort. The Board also found that Abatti had unlawfully laid off two employees because of their support for the UFW, and had laid off four others as a disguise for the layoff of the union supporters. Without reaching the general question of an employer's obligation to bargain over economically-motivated crop decisions, the Board found that Abatti had unlawfully discontinued the rapini crop as insurance against a possible strike without having grounds to believe a strike was imminent. In light of its finding that Abatti had supported and assisted the decertification campaign, the Board concluded that Abatti's refusals to bargain with the union subsequent to the decertification election were unlawful.

The Board ordered Abatti to reinstate and compensate the wrongfully laid-off employees. Abatti was also ordered to make whole affected employees "for all losses of pay or other economic losses they may have incurred as a result of [Abatti's] refusal to bargain." (Pet. App. A, p. 14.)[2]

The Board's decision issued on October 28, 1981, and, in accordance with the time limitations of California

[2] Determination of the number of employees involved and the amount of compensation due under the order is deferred to a subsequent administrative proceeding. (See, *J. R. Norton Co.* v. *Agricultural Labor Relations Bd.*, 26 Cal.3d 1, 11 (1979).

Labor Code section 1160.8, Abatti filed a petition for writ of review in the State Court of Appeal within 30 days thereafter. Some seventeen months later, on March 2, 1983, the California Court of Appeal for the Fourth Appellate District summarily denied the petition.[3] On May 4, 1983, the Supreme Court denied Abatti's petition for hearing. (Pet. App. E.)

ARGUMENT

Petitioner here challenges the procedure of the State of California which provides for judicial review of the decisions of the Agricultural Labor Relations Board—and other quasi-judicial administrative tribunals—by writ of review. Petitioner's contention is that the procedure denied Abatti due process because it permitted the Court of Appeal to summarily dispose of the petition for writ of review, i.e., without a written opinion. Petitioner does not here argue that the administrative procedures themselves were in any way constitutionally deficient; nor did petitioner present any such issue to the California Court of Appeal or to the California Supreme Court.

As respondent will demonstrate, summary disposition of petitions to review decisions of administrative tribunals has long been recognized as an acceptable judicial procedure. Moreover, the law is clear that summary disposition of a petition to review the administrative deci-

[3] The petition omits all references to the date of summary denial, and petitioner's printed appendix (Pet. App. C) does not disclose the date on which the order of summary denial was filed. The date is a fact of which this Court can take judicial notice (F.R. Evid. 201), and respondent asks that the Court do so.

sion does not deny due process, where, as here, the constitutional sufficiency of the administrative procedures is assumed.

I

THIS COURT HAS RECENTLY RULED THAT DUE PROCESS IS NOT OFFENDED BY A STATE PROCEDURE WHICH PERMITS SUMMARY DISPOSITION OF JUDICIAL PROCEEDINGS TO REVIEW THE DECISIONS OF ADMINISTRATIVE TRIBUNALS, SO LONG AS DUE PROCESS IS PROVIDED IN THE ADMINISTRATIVE PROCEEDINGS THEMSELVES.

In *Kremer* v. *Chemical Construction Co.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982), this Court considered the petitioner's objection that the judgment of a New York court should not be given res judicata effect in a federal court proceeding under Title VII of the Civil Rights Act of 1964. Kremer had filed an employment discrimination claim with the Equal Employment Opportunity Commission. The claim was referred to the New York State Division of Human Rights (NYHRD), which rejected the claim as meritless. That decision was upheld on administrative appeal. Kremer then filed a petition with the Appellate Division of the New York Supreme Court to set aside the administrative determination, but the administrative decision was summarily affirmed by the Appellate Division—a decision on the merits. Thereafter, Kremer filed suit in federal court under Title VII. This Court concluded that the federal district court was required to give preclusive effect to

the state court's judgment affirming the decision of the administrative tribunal.

Kremer argued that the state judgment should not bar his federal court claim because the New York courts did not resolve the question whether Kremer had suffered discriminatory treatment and because the administrative and judicial procedures were inadequate. Similarly, petitioner Abatti argues here that the California procedures for judicial review were inadequate and did not do not constitute a determination of the issues raised in objection to the Board's decision and order.

The Court rejected Kremer's contention, noting that the decision of the New York court was necessarily a decision that the employment discrimination claim was meritless. In addition, the Court found that the administrative procedures provided ample due process and an adequate opportunity to litigate disputed issues of fact. The Court noted that "the administrative nature of the factfinding process is not dispositive." (456 U.S. 461, 484 n.26.)

Respondent contends that *Kremer* is dispositive of the issues raised by petitioner here. As will be demonstrated, the Agricultural Labor Relations Act (ALRA) affords parties ample due process and opportunity to litigate disputed issues of fact and law. As in *Kremer*, judgment of the California Courts of Appeal summarily denying petitions for review of ALRB orders are decisions on the merits. Accordingly, no substantial issue of due process is raised by petitioner.

II

THE AGRICULTURAL LABOR RELATIONS ACT AFFORDS THE PARTIES BEFORE THE BOARD AMPLE DUE PROCESS AND AN OPPORTUNITY TO LITIGATE DISPUTED ISSUES OF FACT.

Petitioner does not claim that the administrative procedures before the ALRB are constitutionally deficient; nor did petitioner raise any such claim to the Court of Appeal or to the California Supreme Court. (Pet. App. B, D). The issue is therefore not now before this Court. However, respondent will briefly describe those procedures in order that the Court may be satisfied that petitioner raises no substantial federal question by objecting to the procedural scheme for judicial review.

The constitutional adequacy of the administrative procedures provided by the ALRA came under judicial scrutiny by the California Supreme Court in *Tex-Cal Land Management, Inc.* v. *Agricultural Labor Relations Bd.*, 24 Cal.3d 335, 595 P.2d 579 (1978).

The precise issue before the court was whether the Legislature could give preclusive effect to the factual findings of an administrative agency if that agency had not been expressly granted powers as a court. Strictly speaking, then, the issue was one of separation of powers.

Nevertheless, in deciding the question, the State Supreme Court considered the nature of the administrative procedures, and concluded that "the Legislature may accord finality to the findings of a statewide agency

that are supported by substantial evidence on the record considered as a whole and are made under safeguards equivalent to those provided by the ALRA for unfair labor practice proceedings, whether or not the California Constitution provides for that agency's exercising 'judicial power.' " (*Tex-Cal Land Management, supra,* 24 Cal.3d 335, 346.) This analysis has been confirmed by this Court's observation that "the administrative nature of the factfinding process is not dispositive . . . . So long as opposing parties had an adequate opportunity to litigate disputed issues of fact, res judicata is properly applied to decisions of an administrative agency acting in a 'judicial capacity.' " (*Kremer* v. *Chemical Construction Corp., supra,* 456 U.S. 461, 484 n.26, citing *United States* v. *Utah Construction & Mining Co.* 384 U.S. 394, 422 (1966).)

The California Supreme Court had found that the ALRA "generally assures the essentials of due process" (*Tex-Cal Land Management, supra,* 24 Cal.3d at 344), and that it "incorporates procedural safeguards of the [National Labor Relations Act]." (*Id.,* at 345.) Indeed, the administrative procedures provided by the ALRA are vitually *identical* to those provided by the NLRA. Thus, the ALRA provides for issuance of a formal administrative complaint; it contains a statute of limitations; it provides for the right to file an answer, and to appear in person or otherwise and give testimony; and it provides that the rules of evidence—including the right of cross-examination—shall govern. All proceedings are reported. (Cal.Lab. Code, section 1160.2, *Cf.* 29

U.S.C. section 160(b).) The testimony of the proceedings is reduced to writing, and the Board is required to state its findings. (Cal.Lab. Code, section 1160.3, *Cf.* 29 U.S. section 160(c).) The parties are expressly afforded an opportunity to except to any recommended decision of a hearing officer (*Ibid.*), and they have the right to subpoena witnesses. (Cal.Lab. Code, section 1151; *Cf.* 29 U.S.C., section 161.) Parties are expressly permitted to appear by counsel (Cal.Lab. Code, sec. 1151.3; *Cf.* 29 U.S.C. sec. 160(b)), and to petition for judicial review. Cal.Lab. Code, section 1160.8; *Cf.* 29 U.S.C., section 160(f).

The procedures provided under the ALRA are certainly as solicitous of due process guarantees as were those provided by the New York statutes in *Kremer*. This being the case, it does not offend due process for California to provide that petitions for review of ALRB decisions may be disposed of summarily.

III

SUMMARY DISPOSITION OF A PETITION FOR REVIEW OF A DECISION OF THE ALRB IS A RULING ON THE MERITS.

Petitioner argues that the California procedure "has taken away Abatti's right to have a court determine the legality and fairness of the ALRB action." (Petition, p. 8.) But this mischaracterizes the state procedure.

What California has done is provide that reviewing courts are to give preclusive effect to findings of the ALRA inasmuch as the administrative, quasi-judicial [4]

[4] The California Supreme Court did not decide whether, in fact, the

procedures provide adequate due process safeguards. Judicial review is certainly available, but it is not and need not be *de novo* review.

Moreover, the judicial review which is provided results in a decision *on the merits*, even if the case is disposed of in "summary" fashion. Thus, while the California Supreme Court has confirmed the statutory test that findings of the Board with respect to questions of fact are conclusive if supported by substantial evidence (*Tex-Cal Land Management, Inc.* v. *Agricultural Labor Relations Bd., supra*, 24 Cal.3d 335, 343–346), the Court has nevertheless made clear that "the test of substantiality must be measured on the basis of the entire record, rather than by simply isolating evidence which supports the board and ignoring other relevant facts of record which rebut or explain that evidence." (*Martori Brothers Distributors* v. *Agricultural Labor Relations Bd.*, 29 Cal.3d 721, 727, 631 P.2d 60 (1981), quoting from *Garza* v. *Workmen's Comp. App. Bd.*, 3 Cal.3d 312, 317, 475 P.2d 451 (1970).) And the State Supreme Court has directed that, where reviewing courts find administra-

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Legislature had granted judicial powers to the ALRB pursuant to a provision of the California Constitution, concluding that the analysis turned more appropriately upon the nature of the fact-finding procedures rather that the particular label given to the tribunal. Earlier, an intermediate appellate court had concluded that judicial power is in fact conferred on the Board. (*Perry Farms, Inc.* v. *Agricultural Labor Relations Bd.*, 86 Cal.App.3d 448, 460–462, 150 Cal.Rptr. 495 (1978).) The Supreme Court has since indicated that its *Tex-Cal Land Management* decision did not necessarily overrule the conclusion of the Court of Appeal in *Perry Farms*. (See *Pacific Legal Foundation* v. *Brown*, 29 Cal.3d 168, 197 n.19, 624 P.2d 1215 (1981).)

tive rules which alter or amend the statute or enlarge or impair its scope, "the courts not only may, but it is their obligation to strike down such regulations." (*J.R. Norton Co.* v. *Agricultural Labor Relations Bd.* 26 Cal.3d 1, 29, 603 P.2d 1306 (1979).)

The gravamen of petitioner's complaint appears to be that when the reviewing courts "summarily" deny a petition for review, i.e., affirm the decision of the Board without written opinion, the petitioning party has no way of knowing the precise reasoning for the affirmance. Indeed, counsel for petitioner made the following remarks in a proceeding before the United States District Court for the Southern District of California, wherein Abatti was seeking an injunction against enforcement of the Board's decision and order:

> [Counsel for the Board] says that it must be presumed that the Court of Appeal acted lawfully and that it must be presumed that the Court of Appeal fully and fairly considered Abatti's petition, and it is that presumption, your Honor, that lies at the heart of our constitutional objections. We have no opportunity to rebut that presumption. We don't know. We agree with [sic] [counsel for the Board]; we have no idea. We may have been accorded all the due process in the world. It could be that the justices on the Court of Appeal convened and had bench memos written and argued back and forth and finally came to the conclusion that every single thing the Board did was appropriate and proper and there's absolutely no basis to change the Board's order at all. That may have occurred, but we don't know. It's entirely possible also that the case stayed in the basement, that a clerk

> looked at the case and said, "Well, all they're saying is there wasn't substantial evidence, and we're not interested in substantial evidence cases." It's entirely possible that that occurred. We don't know, and, your Honor, we have no way of knowing.

(Richard A. Paul, Esq., for plaintiff Abatti Farms, Inc., in Abatti Farms, Inc. v. Agricultural Labor Relations Board, Civil Action No. 83-1111-E, United States District Court for the Southern District of California, Reporter's Transcript of Proceedings, Thursday, June 16, 1983, at pp. 23, 24.)

Of course, the same complaint could be raised about this Court's summary disposition of an appeal. While this Court may be required to adjudicate appeals, the Court is not obligated to grant each case plenary consideration and may summarily dismiss an appeal. Such a dismissal is, nevertheless, a decision on the merits. (See, *Hicks* v. *Miranda*, 422 U.S. 332, 343–345 (1975).) Indeed, it has evidently been the practice of the Court since 1902 to refuse to hear cases coming within its obligatory jurisdiction when the question raised was deemed wholly without merit. (Stern & Gressman, *Supreme Court Practice (5th ed.)*, Bureau of National Affairs (1978), p. 319; *Cf.* F.R.A.P. 34, 36.)

Likewise, the decision of a California Court of Appeal to summarily deny a petition for writ of review is nothing more than a decision not to grant plenary consideration to a case:

> Section 1160.8 does not command courts to entertain oral argument and write an opinion on every petition but declares simply that the court "shall have

> jurisdiction" to enforce, modify, or set aside the ALRB order. Because of the prevalent pattern of discretionary review and doubts whether article VI, section 10 [of the California Constitution] authorizes legislatively compelled plenary hearings on petitions for extraordinary relief, we construe section 1160.8 to allow summary denials in the court's sound discretion.
>
> Courts should not make that disposition, however, until after the petitioner has had reasonable time to file points and authorities in light of the record filed by the ALRB. Ordinarily in writ proceedings the petitioner has the burden of furnishing a sufficient record. [citations omitted.] By shifting that burden to the ALRB, section 1160.8 impliedly assures the petitioner an opportunity to present written arguments based on the board-certified record.

(*Tex-Cal Land Management, Inc., supra,* 24 Cal.3d at 351.) Thus, the State Supreme Court manifestly recognized that reviewing courts must consider the arguments raised by the petitioner, but concluded that plenary consideration need not be given every case.

In another context, the California Supreme Court has held that where the petition for review is the sole means of obtaining judicial review of the decision of an administrative tribunal, a summary denial of such a petition is a decision on the merits, although such a decision is given no precedential value. (*Consumers Lobby Against Monopolies* v. *Public Utilities Com.* 25 Cal.3d 891, 899-905, 603 P.2d 41 (1979); see also *Dash, Inc.* v. *Alcoholic Beverage Control Appeals Bd.,* 683 F.2d 1229, 1235 (9th Cir. 1982).) Precisely the same reasoning ap-

plies to summary disposition of a petition for review under Labor Code section 1160.8, and this was recognized by the California Supreme Court:

> [B]y summarily denying a petition the court declines to exercise further jurisdiction in the matter. Once the denial becomes final the case must be treated as one for which "the time for review has lapsed," opening the way for the ALRB to seek enforcement by the superior court under the last paragraph of section 1160.8 [citation to earlier footnotes] [5].

(*Tex-Cal Land Management, Inc., supra*, 24 Cal.3d at 352.)

Under the writ procedure provided by Labor Code section 1160.8, then, a petitioner is assured that all of its arguments will be considered. The petitioner is guaranteed a decision on the merits, but it is not guaranteed plenary consideration of its case.

In the instant matter, petitioner was obviously afforded a full and complete opportunity to brief any and all objections to the Board's decision and order. (Pet. App. B.) Nothing in the Constitution mandated the Court of Appeal to grant plenary consideration to Abatti's petition for review, and as would be the case with any court, it must be presumed that the Court of Appeal duly considered petitioner's arguments, since it was obligated by

---

[5] The relevant language of the footnotes referred to by the court consists of the following: "If the time for review has lapsed, the board may apply to the *superior* court, which must enforce the order *without reviewing the merits* if it determines that the order was issued pursuant to established board procedures and there is a refusal to comply" (24 Cal.3d at 348 n.8; italics, the court's.)

law to do so. Abatti has received all the judicial review and due process to which it is entitled.

CONCLUSION

Inasmuch as petitioner raised no claim to the state courts that the administrative procedures before the Agricultural Labor Relations Board are insufficient to provide due process, petitioner presents no substantial federal question by objecting to the state procedure which permits disposition of petitions for review without plenary consideration. Accordingly, the petition for writ of certiorari should be denied.

DATED:

Respectfully submitted,

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Solicitor of the Board

DANIEL G. STONE
Chief Deputy Solicitor

Counsel of Record

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Office-Supreme Court, U.S.
FILED
OCT 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-190

IN THE

Supreme Court of the United States

October Term, 1983

ABATTI FARMS, INC. AND ABATTI PRODUCE, INC.
Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD AND
UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of California

PETITIONERS' REPLY BRIEF

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IN THE

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October Term, 1983

ABATTI FARMS, INC. AND ABATTI PRODUCE, INC.
Petitioners,

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UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of California

PETITIONERS' REPLY BRIEF

I

THE ALRB'S RELIANCE ON *KREMER* IS MISPLACED.

The ALRB suggests that *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982), is "dispositive of the issues" raised by Abatti. Respondent's Brief in Opposition, at 6.

In *Kremer*, the Court was not presented with, and did not decide, the issues presented in this case, for the very reason that judicial review under the New York Human Rights Law[1] there at issue resulted in a judgment, on the merits of the appeal, which was entitled to res judicata effect under New York law. 456 U.S. at 466-467. The judgment of the Supreme Court, Appellate Division, in *Kremer*, was issued pursuant to N.Y. Exec. Law § 298 (McKinney 1972), which mandates that the petition "shall be heard and determined" and that the court issue its "judgment and order" on the merits of the cause before it. Kremer received that which Abatti did not, and that which Abatti contends is constitutionally compelled: An adjudication of the merits of its appeal.[2]

---

1. N.Y. Exec. Law § 290, *et seq.* (McKinney 1972).

2. The full text of the Appellate Division's judgment in *Kremer* is reproduced as Appendix A. The judgment recites that the court read the papers, heard the litigants, deliberated on the merits of the case before it, and confirmed the ruling below.

II

THE ALRB'S CONTENTION THAT SUMMARY DISPOSITION OF A PETITION FOR REVIEW OF A DECISION OF THE ALRB IS A RULING ON THE MERITS IS A TRANSPARENT ATTEMPT TO PROCURE DENIAL OF THIS PETITION. IN FACT, THE ALRB AGREES WITH THE CONTENTIONS RAISED BY ABATTI.

The ALRB argues for purposes of this petition that summary denials of petitions for review of ALRB decisions constitute rulings on the merits, analogous to this Court's decisions summarily dismissing appeals, or summary denials of review of decisions of California constitutional agencies vested with judicial power. Respondent's Brief in Opposition, at 9-15.

In its own adjudicated cases,[3] the ALRB concedes that summary denials of petitions to review its decisions are nothing more than a refusal by the Court of Appeal to exercise discretionary jurisdiction, and do not constitute affirmances on the merits:

> We noted in *High and Mighty Farms* (1982) 8 ALRB No. 100, that the appeal process under the National Labor Relations Act (NLRA) differs from the appeal process under the Agricultural Labor Relations Act (ALRA). Orders issued by the NLRB are not self-executing, and the NLRB must apply to the appropriate United States Court of Appeals to secure enforcement of its orders. Any person aggrieved by a final order of the NLRB may seek review of the order. Unlike the NLRA, the ALRA provides for discretionary review of our orders by a California Court of Appeal, rather than review as of right under

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3. The full texts of the two cited ALRB opinions are lengthy. Abatti has quoted those portions material to the issue presented. Abatti would be pleased to provide full texts if the Court desires.

> the NLRA. Thus, under the ALRA, when a court of appeal declines to exercise jurisdiction by denying a petition for review, the status of the case is as if no appeal had been filed, and this Board retains jurisdiction to modify and enforce its remedial Order. (*High and Mighty Farms, supra*, 8 ALRB No. 100 citing *Tex-Cal Land Management, Inc.* v. *ALRB* (1979) 24 Cal.3d 335.) *Abatti Farms, Inc. and United Farm Workers*, 9 ALRB No. 59, at 21 (ALRB, October 7, 1983).

In *High and Mighty Farms and United Farm Workers*, 8 ALRB No. 100, at 14 (1982), the Board held:

> The Court of Appeal denied the petition for review in the instant case, and it has therefore been neither affirmed nor reversed by the court. According to the Supreme Court's *Tex-Cal* decision, the present status of this case is as if the appeal had never been filed. Since the Court of Appeal's denial of the petition for review is not a decree or order of the court, our original remedial Order in this case is intact, and our power to modify the Order is the same as it would have been had there been no appeal. [Footnotes omitted.]

III

CONCLUSION

Where it served its interest[4] the ALRB has recognized that summary denials are not judicial acts of affirmance or

---

4. *High and Mighty, supra*, dealt with the power of the ALRB, after summary denial of review, to modify its order to increase the interest rate on make whole awards. In that context, the Board found that there was no res judicata bar to further action on its part since no order or decree was entered by the court of appeal affirming or reversing the Board's decision. *See* text, *supra*. The Board thus advances the anomalous position that summary denials are on the merits for aggrieved parties, but not on the merits for the Board itself.

reversal and do not entail the entry of an order or decree which has preclusive effect. The effect of a summary denial is to leave the case as if no petition had ever been filed. Unlike Ruben Kremer, Abatti has not had its day in court to have the merits of its case decided under the appropriate standard for review.[5]

DATED: October 12, 1983

Respectfully submitted,

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5. *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966), relied on by the ALRB, holds only that finality may be accorded administrative findings of *fact* supported by substantial evidence. 384 U.S. at 399, 400, 404, 410. It does not hold, as the ALRB suggests, that unreviewed agency orders may be accorded the same res judicata effect on issues of law as judgments of a court. Abatti does not quarrel with according finality to agency findings of fact so long as they are determined by a court to be supported by substantial evidence.

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
FIRST DEPARTMENT

* * *

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 27, 1978

Present-Hon. Francis T. Murphy, Jr., Presiding Justice
Samuel J. Silverman
Herbert B. Evans
Arnold L. Fein
Arthur Markewich Justices

1877

[M-4560]

RUBIN KREMER,

—against—

THE STATE DIVISION ON HUMAN RIGHTS,
THE STATE HUMAN RIGHTS APPEAL BOARD
and CHEMICAL CONSTRUCTION CORPORATION,
RESPONDENTS

The above-named petitioner having presented a petition to this Court praying for an order, pursuant to Section 298 of the Executive Law, setting aside and annulling the determination of respondent The State Human Rights Appeal Board dated November 25, 1977, which affirmed an order of the respondent The State Division on Human Rights dated April 28, 1977, dismissing petitioner's complaint and determining there was no probable cause to believe that respondent Chemical Construction Corporation engaged in the unlawful discriminatory practice complained of, and respon-

dent Chemical Construction Corporation having submitted a memorandum in answer to said petition,

Now, upon reading and filing the notice of application, with proof of due service thereof, the petition of Rubin Kremer, verified December 6, 1977, and the memorandum of Rubin Kremer, all read in support of the application, and the memorandum of Messrs. Layton and Sherman in opposition to said application, and after hearing Mr. Rubin Kremer, appearing *pro se*, for the application, and Messrs. Layton and Sherman opposed; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent, The State Human Rights Appeal Board, be and the same hereby is confirmed, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI
Clerk

Source: Joint Appendix, *Kremer* v. *Chemical Construction Corp.*, No. 80-6045 (October Term, 1981) at 23-26.

MOTION FILED
OCT 14 1983

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-190

ABATTI FARMS, INC. AND ABATTI PRODUCE INC.,

Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD AND UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Respondents.

MOTION OF WESTERN GROWERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF GRANTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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No. 83-190

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ABATTI FARMS, INC. AND ABATTI PRODUCE, INC.,

Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD AND UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA

MOTION OF WESTERN GROWERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF GRANTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Western Growers Association respectfully moves this Court for leave to file the accompanying brief **amicus curiae** in support of granting the petition of Abatti Farms, Inc. and Abatti Produce, Inc. ("Abatti") for **certiorari** to the Supreme Court of the State of California. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

INTEREST OF WESTERN GROWERS ASSOCIATION

Western Growers Association, a non-profit trade organization, was formed more than 50 years ago for the express purpose of representing the interests of the farming community. The Association's 1061 members grow and ship approximately 85 percent of the fresh vegetables and 50 percent of the fresh fruit produced in California and Arizona.[1] Association members frequently are parties to proceedings involving the California Agricultural Labor Relations Board ("ALRB" or "Board"). Of the 170 cases listed in Petitioners' Cumulative ALRB Litigation Results appendix,[2] 82 cases involved Western Growers Association members, and Association attorneys provided representation in 41 of those cases.[3]

1. If California fresh fruit and vegetable production is considered by itself, these percentages remain unchanged. The Association's Arizona roster contains no more than 86 members.
2. **See** Petition for Writ of Certiorari, Appendix F.
3. Appendix A.

The vast majority of Association members have fared no better than Abatti when filing petitions for writs of review.[4] Western Growers Association members appealing ALRB orders to the California Courts of Appeal have received summary denials of 80.7 percent of their petitions.[5]

This Court's decision will have a profound effect upon the constitutional rights of Association members. Western Growers Association is therefore particularly concerned that it have an opportunity to present its views.

ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

Western Growers Association submits that the economic importance of California agriculture combine with the predilection of ALRB members to abuse their administrative discretion makes the availability of judicial review on the merits critical.

The Association is also disturbed by the Agricultural Labor Relations Board's heavy reliance on **Kremer v. Chemical Construction Corp.**, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982), for the proposition that summary judicial review of administrative proceedings is compatible with due process. For a variety of reasons, **Kremer** does not merit this characterization, and Western Growers Association is concerned that an accurate analysis be presented to this Court.

4. Petitioners are also members of Western Growers Association.

5. Of the cases involving petitions for writs of review listed in Appendix F of the Petition for Writ of Certiorari, 57 were filed by Western Growers Association members; 46 were summarily denied. See Appendix A.

Finally, in prior Board hearings the ALRB has consistently held that denial of a petition for review by the Court of Appeal is not a decree or order of that court, is not a re-
of Appeal is not a decree or order of that court, is not a judgment on the merits, and does not operate as **res judicata** or collateral estoppel. Most recently, the ALRB reaffirmed this principle in a case involving Abatti Farms itself. Western Growers Association believes the ALRB's own holdings should be taken into account when deciding how much weight to accord its current contention that denial of a petition for review is a judgment on the merits.

WHEREFORE, Western Growers Association respectfully moves for permission to file the attached brief **amicus curiae**.

Respectfully submitted,

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No. 83-190

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

ABATTI FARMS, INC. AND ABATTI PRODUCE, INC.,

Petitioners,

vs.

AGRICULTURAL LABOR RELATIONS BOARD AND UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF AMICUS CURIAE WESTERN GROWERS ASSOCIATION IN SUPPORT OF GRANTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Western Growers Association respectfully submits this brief in support of the petition of Abatti Farms, Inc. and Abatti Produce, Inc. ("Abatti") for **certiorari** to the Supreme Court of the State of California.

INTEREST OF AMICUS CURIAE

A statement describing Western Growers Association and its interest in this case is set forth in the preceding motion requesting leave to file this brief **amicus curiae**.

ARGUMENT

I.
GIVEN THE IMPORTANCE OF CALIFORNIA AGRICULTURE, JUDICIAL REFUSAL TO REVIEW THE VAST MAJORITY OF PETITIONS FOR WRITS OF REVIEW IS UNJUSTIFIED.

The economic importance of California agriculture on both the state and national level amplifies the significance of this case. In 1982, over 80,000 farms employing an average of 288,700 workers generated 14.3 billion dollars in

cash receipts.[1] Last year, total economic activity derived from California agriculture was estimated at 57.2 billion dollars, over 13 percent of the gross state product.[2]

1. Employment figures are derived from California Employment Development Department Report 881W (December 12, 1982). Due to a change in methodology, an annual average is not available for 1982. The 1982 cash receipts figure is contained in the 1982 Annual of the California Department of Food and Agriculture, Crop and Livestock Reporting Service. Volume *I*, Part 5 of the 1978 Census of Agriculture (published in June, 1981 by the United States Department of Agriculture, Bureau of the Census) documents the number of California farms.

2. California Department of Water Resources Bulletin No. 210, "Measuring Economic Impacts: The Application of Input-Output Analysis to California Water Resources Problems (March, 1980)." Each commodity has its own dollar multiple; the average multiple is three dollars in cash receipts produced in agriculture-related industries for each dollar in cash receipts directly produced by agriculture.

California gross state product figures are contained in the University of California at Los Angeles Business Forecast for the Nation and California, page 98, table 33. (1983)

California also has led the nation in agricultural cash receipts for 35 consecutive years.[3] The state is responsible for 39.1 percent of the country's vegetable, fruit and nut production,[4] as well as approximately 10 percent of national agricultural exports.[5] California produces more of 48 commercial crops than any other state.[6]

3. California Department of Food and Agriculture, Crop and Livestock Service, 1982 Annual.

4. United States Department of Agriculture Research Service, "Economic Indicators of Farms Sector, State Income, and Balance Sheet Statistics (1981)."

In 1981, California produced 2.579 billion dollars in cash receipts of the country's 8.418 billion dollars in vegetables, a 30.6 percent market share. The state contributed 3.077 billion dollars, or 47.6 percent, to the national total of 6.464 billion dollars in cash receipts from fruits and nuts.

Total national agricultural cash receipts in 1981 -- including the leading sectors such as dairy and livestock -- were 143.4 billion dollars. California contributed 13.9 billion dollars, or 9.7 percent.

A further indicator of the market dominance of California agriculture is contained in Appendix B, which details the percentage, by commodity, of California agricultural production relative to national production.

5. California Department of Food and Agriculture, "Exports of Agricultural Products Produced in California 1981-1982)"; United States Department of Agriculture, Economic Research Service, "Foreign Agricultural Trade of the United States (March-April, 1983)." The USDA reports a smaller export share -- 7.9 percent in 1981 - than does the California report.

6. California Department of Food and Agriculture, Crop and Livestock Service, 1982 Annual.

To ensure the vitality of this industry and improve labor relations, the Agricultural Labor Relations Board ("ALRB") was established in 1975 pursuant to the Agricultural Labor Relations Act ("ALRA").[7] The ALRA is modeled after the National Labor Relations Act ("NLRA"),[8] and the ALRB is required to follow applicable NLRA precedent.[9]

The ALRB has ignored this mandate, however, and has consistently deviated from NLRA precedent.[10] In addition, the political inclinations of the majority of Board members prevent the ALRB from operating as a neutral arbiter of labor disputes:

> While [it] was undoubtedly the intention of the Legislature [that the ALRB be an "expert agency"], there is no information in the record regarding the expertise of the persons occupying the positions on the Board. If we could take judicial notice of the political inclinations and formal and practical background and intellectual qual-

7. Cal.Lab. Code §1141 **et seq.** (West Supp. 1983).
8. 29 U.S.C. §141 **et seq.** (1976).
9. Cal.Lab. Code §1148 (West Supp. 1983).
10. As the California Court of Appeal stated in **Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Board**, 93 Cal.App.3d 922, 940, 156 Cal.Rptr. 152 (1979):

> Here the Board in its short life had acquired little expertise; it would have done well [in fashioning remedies for ALRA violations] to have drawn on the long experience of its federal counterpart, the National Labor Relations Board, and the related judicial determinations under the National Labor Relations Act.

> ities of the members of the Board, our assessment might be far less complementary than implied by the principal opinion. **United Farm Workers v. Superior Court**, 72 Cal.App.3d 268, 277, 140 Cal.Rptr. 87 (1977) (concurring and dissenting opinion of Brown, P.J.)

The vagaries of the ALRB increase the probability of administrative abuse of discretion. This abuse is of particular concern with respect to the "make-whole" remedy imposed on Abatti; the California Supreme Court has, in an analogous context, recognized the deterrent effect of "make-whole" on appeal-worthy cases.[11] Court of Appeal review of Board orders on the merits is therefore especially important as a check on arbitrary administrative action.[12] Nevertheless, the Courts of Appeal have consistently refused to provide this review.

Notwithstanding the productivity of California farmers, agriculture in this state is subject to the same uncertainties as in the rest of the nation. Farmers face an array of variables such as weather, market conditions, and crop decisions. The refusal of the California Courts of Appeal to review the vast majority of ALRB decisions introduces yet another uncertainty into the life of the farmer. Like climatic variables, it affects millions of dollars of agricultural productivity. Unlike these variables, it is both completely unnecessary and readily cured.

11. **See J.R. Norton Co. v. Agricultural Labor Relations Board**, 26 Cal. 3d 1, 34-35, 603 P.2d 1306 (1979), and cases cited therein.
12. **J.R. Norton Co. v. Agricultural Labor Relations Board**, 26 Cal.3d at 33.

II.

KREMER v. CHEMICAL CONSTRUCTION CORP. IS FACTUALLY INAPPOSITE TO THE PRESENT CASE.

The ALRB contends that **Kremer v. Chemical Construction Corp.**, 456 U.S. 461, 102 S. Ct. 1883, 72 L.Ed.2d 262 (1982), is "dispositive of the issues raised" by Abatti.[13] For a number of reasons, this reliance is misplaced.

Kremer filed an employment discrimination charge with the Equal Employment Opportunity Commission ("EEOC") under Title VII of the Civil Rights Act of 1964.[14] The EEOC referred the charge to the New York State Division of Human Rights ("NYHRD"), which is responsible for enforcing New York's employment discrimination laws.[15]

After investigation, the NYHRD concluded that there was no probable cause to support Kremer's complaint. The Appeal Board of the NYHRD upheld this finding on the grounds that it was not "arbitrary, capricious, or an

13. Respondent's Brief in Opposition at p. 6.

14. 78 Stat 253, as amended, 42 U.S.C. §2000e **et seq.** (1976).

15. N.Y. Exec. Law §§295(6), 296(1)(a) (McKinney 1982). Section 706(c) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(c), requires the EEOC to refer to such complaints to the appropriate state agency for initial review. See 456 U.S. at 463-64, 102 S. Ct. at 1888, 72 L.Ed.2d at 269.

abuse of discretion."[16]

Kremer again notified the EEOC of his complaint, and petitioned the Appellate Division of the New York Supreme Court to set aside the Agency's finding. The Appellate Division unanimously affirmed the Appeal Board's order; Kremer did not seek further review by the New York Court of Appeals.

Subsequently, a District Director of the EEOC issued a right-to-sue letter and refused a request for reconsideration. Kremer then filed a Title VII action in District Court. The suit proceeded through the Court of Appeals to this Court.[17] A sharply-divided Court[18] held that 28 U.S.C.

16. 456 U.S. at 464, 102 S. Ct. at 1888, 72 L.Ed.2d at 269. When the NYHRD finds no probable cause for a complaint -- as in Kremer's case -- a reviewing court must affirm the division's decision unless it is "arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion." N.Y. Exec. Law §297-a(7)(e) (McKinney 1982). If the agency finds no probable cause to support the complaint and holds a hearing, the decision must be affirmed if it is "supported by substantial evidence on the whole record." N.Y. Exec. Law § 297-a(7)(d) (McKinney 1982). Although these sections specifically describe the scope of review by the NYHR Appeal Board, the same standards also apply to review of NYHRD decisions by New York courts. **See** N.Y. Exec. Law §298 (McKinney 1982)(findings of fact shall be conclusive "if supported by sufficient evidence on the record considered as a whole"); N.Y. Civ. Prac. Law §7803 (McKinney 1982); **Mize v. State Division of Human Rights**, 33 N.Y.2d 53, 57, 349 N.Y.S.2d 364, 367-68, 304 N.E.2d 231, 233 (1973).

17. 456 U.S. at 466, 102 S.Ct. at 1889, 72 L.Ed.2d at 270.

18. Justice Blackmun filed a dissenting opinion, in which Justice Brennan and Justice Marshall joined. Justice Stevens filed a separate dissenting opinion.

§1738 required federal courts to give preclusive effect to the state court's judgment upholding the state administrative agency's rejection of the employment discrimination claim.

The applicability of **Kremer** is doubtful from the outset because the opinion focuses on the complex interplay between Title VII of the Civil Rights Act of 1964[19] and the preclusive effect upon state court judgments of 28 U.S.C. §1738. The specific constitutional issues raised by Abatti were not the subject of **Kremer**; the ALRB has taken the case out of context.

Kremer's Title VII emphasis reveals another distinction from this case. Despite their differences, the Justices agreed that Title VII permits a trial **de novo** in federal district court of an unreviewed state agency determination.[20] The preclusive effect of 28 U.S.C. §1738 operates only when a complainant has obtained judicial review of that agency's findings.

In contrast, Abatti has had no such opportunity. The California Court of Appeal is the **only** court empowered to hear appeals from ALRB findings and orders.[21] If the Court of Appeal does not grant review, the Board may request the Superior Court to enforce the order, and the Superior Court is statutorily precluded from reviewing its merits.[22]

19. 78 Stat 253, as amended, 42 U.S.C. §2000e **et seq.** (1976)
20. 456 U.S. at 470, n. 7, 102 S.Ct. at 1891, n. 7, 72 L.Ed.2d at 273, n. 7; 456 U.S. at 487, 102 S.Ct. at 1900, 72 L.Ed.2d at 284 (dissenting opinion of Blackmun, J.); 456 U.S. at 508-509, 102 S.Ct. at 1911, 72 L.Ed.2d at 297 (dissenting opinion of Stevens, J.).
21. Cal. Lab. Code §1160.8 (West Supp. 1983).
22. **Id.**

The **Kremer** court additionally found that the New York administrative procedures satisfied due process, noting that "the administrative nature of the factfinding process is not dispositive."[23] The Board cites this language, apparently for the proposition that Abatti was also provided due process.[24]

Abatti does not ask this Court to re-evaluate the administrative factfinding process. Rather, the questions presented by Abatti deal with the absence of due process at the **judicial** level.

Similarly, the ALRB emphasizes the constitutional adequacy of ALRA administrative procedures. The quality of review provided by the Court of Appeal, not the ALRA administrative scheme, is the subject of Abatti's argument.

23. 456 U.S. at 484, n. 26, 102 S.Ct. at 1889, n. 26, 72 L.Ed.2d at 282, n. 26.

24. Discussing the Court's treament of this subject, Justice Blackmun noted:

> This discussion by itself demonstrates the fallacy of the Court's attempt to differentiate between the state agency's decision and the state court's affirmance of that decision. By relying more on the adequacy of the state agency's procedures than on the adequacy of the state court's procedures, the Court underscores that it is, in fact, granting preclusive effect to a state administrative decision. 456 U.S. at 497, 102 S.Ct. at 1905, 72 L.Ed. 2d at 290 (dissenting opinion of Blackmun, J.) (emphasis in original).

Most importantly, neither the majority nor minority opinions in **Kremer** address the central issue in this case -- the quality of the judicial review that Kremer actually received.[25] **Kremer** does not indicate whether the judicial affirmance of the NYHRD's findings was a summary decision -- as in Abatti's case -- or whether some statement of reasons, however brief, accompanied the holding. The absence of this statement is the core of Abatti's complaint; no case can be considered helpful, let alone controlling, if it does not contain this information.

In fact, unlike Abatti, Kremer received more than a one-sentence summary decision; the Appellate Division of the New York Supreme Court discussed its affirmance of the NYHR Appeal Board at some length.[26] Under New York law, the Appellate Division's order was final and binding, and constituted a "judgment. . .determining the rights of the parties."[27]

In contrast, the ALRB has repeatedly held that summary denial of a petition for review is **not** a judgment on

25. As Justice Stevens indicated, "[t]he proper resolution of the dispute depends. . .on the character of the judicial review to which the agency review is subjected." 456 U.S. at 509, 102 S.Ct. at 1911, 72 L.Ed.2d at 297 (dissenting opinion of Stevens, J.).

26. Appendix C.

27. N.Y. Exec. Law § 298 (McKinney 1982). Section 298 provides, **inter alia**:

> The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the court of appeals in the same manner and form and with the same effect as provided for in a special proceeding.

the merits. The issue has arisen when determining whether interest rates on ALRB backpay orders can be increased retroactively after the Court of Appeal has denied a petition for review. Faced with the contention that denial of the petition operates as **res judicata**, precluding modification of the ALRB's order, the Board has responded:

> The Court of Appeal denied the petition for review in the instant case, and it has therefore been neither affirmed nor reversed by the court. According to the Supreme Court's **Tex-Cal** decision,[28] the present status of this case is as if the appeal had never been filed. Since the Court of Appeal's denial of the petition for review is not a decree or order of the court, our original remedial Order in this case is intact, and our power to modify the Order is the same as it would have been had there been no appeal. **High and Mighty Farms**, 8 ALRB No. 100 at p. 14 (1982).

In an accompanying footnote, the **High and Mighty** Board continued: "Since the petition for review in this matter was denied by the Court of Appeal, it is as though no record has been filed."[29]

Most recently, the ALRB reaffirmed this position in a case involving Abatti itself. Citing the above language from **High and Mighty Farms,** the Board held that

28. **Tex-Cal Land Management, Inc. v. Agricultural Lab. Rel. Bd., 24 Cal.3d 335, 156 Cal.Rptr. 1, 595 P.2d 579 (1979).**
29. **8 ALRB No. 100 at p. 14, n. 7.**

denial of a petition for review was not a judgment on the merits and therefore not entitled to **res judicata** effect.[30]

Amicus curiae submits that the ALRB may not alter its characterization of Court of Appeal judgments merely to suit its current litigation posture. Having repeatedly held that judicial denial of a petition for review is "not a decree or order" of the Court of Appeal, the ALRB's assertion that Abatti received a judicial determination on the merits should be accorded little weight.

III.

THE ALRB TACITLY CONCEDES ABATTI'S ARGUMENT.

The ALRB's Brief in Opposition is notable not for its contents but for its omissions. It concedes significant issues raised by Abatti by failing to address them.

Abatti points out that the ALRB has been singled out for special treatment; it is the only California administrative agency that can both award damages and obtain judicial enforcement of its orders without any judicial determination of the legality of its order.[31] Participants in ALRB proceedings are thereby excluded from California's review system. In its brief, the ALRB makes no response to this argument.

30. **Abatti Farms**, 9 ALRB No. 59 at p. 21 (1983).

31. Petition for Writ of Certiorari at p. 16.

More importantly, the ALRB completely ignores Abatti's discussion of the constitutional right to judicial review,[32] preferring to limit its discussion to ALRA procedures. This omission may be deliberate, given the Court's recent indications that administrative adjudications cannot constitutionally be shielded from judicial review.[33]

IV.

CONCLUSION

In **St. Joseph Stock Yards Co. v. United States**, 298 U.S. 38, 84, 56 S.Ct. 720, 80 L.Ed. 1033 (1936), Justice Brandeis (concurring) stated:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.

32. **Id.** at pp. 16-19.

33. **Northern Pipeline Construction v. Marathon Pipeline Co.**, - U.S. -, 102 S. Ct. 2858, 2870-71, n. 23, 73 L.Ed.2d 598 (1982); **Atlas Roofing Co., Inc. v. Occupational Safety and Health Service Commission**, 430 U.S. 442, 455, n. 13, 97 S. Ct. 1261, 1269, n. 13, 51 L. Ed.2d 464 (1977).

Abatti's request involves no more than a reaffirmation of this principle. Wherefore, **amicus curiae** Western Growers Association respectfully prays that the California Court of Appeal be directed to reverse, modify or affirm Abatti's case on the merits.

DATED: October 13, 1983

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APPENDIX A

SELECTED ALRB LITIGATION RESULTS[1]

(As of May 11, 1983)

U.S. COURT OF APPEALS			ALRB[2] Upheld	Mixed Result	Adverse Ruling
m[3] (o)[4]	1.	Cel-A-Pak v. ALRB (1978)	1		
m (po)[5]	2.	Cel-A-Pak v. ALRB (1982)			
		Cel-A-Pak v. ALRB (1982) 680 F. 2d 664 ...	1		

1. For cumulative ALRB litigation results as of May 11, 1983, see Petitioners' Petition for Writ of Certiorari, Appendix F.

2. The "ALRB Upheld" heading indicates cases in which the Board's position has been affirmed by the courts. This includes cases in which the courts have summarily denied petitions for review of board orders. "Mixed Result" includes those cases in which a court has -- either by its judgment or by its rationale -- given partial approval to the Board's reasoning and/or to the result sought by the Board, while rejecting other aspects of the Board's position. This category includes petition for review cases in which the Board's final order was only partially enforced. "Adverse Ruling" indicates cases in which the Board's position has been rejected.

3. "m" indicates that a Western Growers Association member was a party in the case.

4. "o" indicates that an opinion issued.

U.S. DISTRICT COURTS			ALRB Upheld	Mixed Result	Adverse Ruling
m(o)	1.	Borchard v. ALRB (1977)			1
m(o)	2.	Cel-A-Pak v. ALRB (1979)			1
m(o)	3.	Cel-A-Pak v. ALRB (1977)			1
mr (o)[6]	4.	Western Growers Assoc. v. Brown (1980)			1
CALIFORNIA SUPREME COURT					
m (po)	1.	Belridge Farm v. ALRB (1978) 21 Cal. 3d 551			1
m (po)	2./	Tex-Cal Land Mgmt. v. ALRB (1979) 24 Cal. 3d 335 (3:14)[7]			1

5. "po" indicates a published opinion.

6. "r" indicates that Western Growers Association attorneys provided representation in the case.

7. The notation "3:14" indicates that the case concerns Board decision 3 ALRB No. 14.

CALIFORNIA SUPREME COURT (cont'd)			ALRB Upheld	Mixed Result	Adverse Ruling
mr (po)	3.	J.R. Norton v. ALRB (1979) 26 Cal. 3d 1 (4:39)		1	
m (po)	4.	Kaplan's Fruit & Produce v. Superior Ct. (1979) 26 Cal. 3d 60 (amicus).....		1	
m (po)	5.	Sam Andrews' Sons v. ALRB (1981) 28 Cal. 3d 781 (3:45).....	1		
mr (po)	6.	Martori Bros. v. ALRB (1981) 29 Cal. 3d 721 (5:47)		1	
mr (po)	7.	San Clemente Ranch v. ALRB (1981) 29 Cal. 3d 874 (5:54)	1		
mr (po)	8.	Highland Ranch v. ALRB (1981) 29 Cal. 3ds 848 (5:54)		1	
mr (po)	9.	ALRB v. California Coastal Farms (1982) 31 Cal. 3d 469	1		

CALIFORNIA COURT OF APPEAL			ALRB Upheld	Mixed Result	Adverse Ruling
(a) NOW PENDING IN SUPREME COURT[8]					
m	1.	Triple E Produce v. ALRB (1982) (6:46) ...			[1]
(b) GENERAL CASES DECIDED					
m	1.	Andrews v. ALRB (1977).....	1		
m (o)	2.	Superior Farming v. Mahoney (1977)	1		
mr	3.	Nish Noroian v. Superior Court (ALRB) (1978).....	1		
m	4.	Bonita Packing Co. v. ALRB (1979) (4:96)...	1		
m (po)	5.	Dessert Seed Co. v. Brown (1979) 96 Cal. App. 3d 69.....		1	

8. The granting of a hearing by the California Supreme Court vacates a Court of Appeal decision. The now-vacated Court of Appeal result for each case now pending in the Supreme Court is indicated in brackets.

(b) GENERAL CASES DECIDED (cont'd)			ALRB Upheld	Mixed Result	Adverse Ruling
mr (po)	6.	San Diego Nursery v. ALRB (1979) 100 Cal. App. 3d 128		1	
mr	7.	Royal Packing v. ALRB & UFW (1980)	1		
mr (po)	8.	California Coastal Farms v. ALRB (1980)...	1		
mr (po)	9.	California Coastal Farms v. Doctoroff (1981) 117 Cal. App. 3d 156	1		

(c) PETITIONS FOR REVIEW DECIDED

m (t)[9]	1.	Frudden Produce/Whitney Farms v. ALRB (1977) (3:68)	1		
m (po) (t)	2.	UFW v. ALRB (Robert S. Andrews) (1977) 74 Cal. App. 3d 347 (3:45)	1		

9. "t" indicates that petition for review was denied because it was not timely filed.

(c) PETITIONS FOR REVIEW DECIDED (cont'd)			ALRB Upheld	Mixed Result	Adverse Ruling
*m[10]	3.	UFW v. ALRB (Baillie) (1978) (3:85)	1		
*m	4.	Adam Farms v. ALRB (1978) (4:12)	1		
*mr	5.	O.P. Murphy v. ALRB (1979) (hg. den., cert. den.)[11] (4:106)	1		
*m	6.	Ron Nunn Farms v. ALRB (1979) (hg. den.) (4:34)	1		
m					
*m	7.	Dave Walsh Co. v. ALRB (1979) (hg. den.) (4:84)	1		
*mr	8.	Martori Bros. v. ALRB (1979) (hg. den.) (4:80)	1		

10. "*" indicates that a petition for review was summarily denied.

11. "Hg. den." indicates that a hearing was denied by the California Supreme Court "Cert. den." indicates that Certiorari was denied by the U.S. Supreme Court.

(c) PETITIONS FOR REVIEW DECIDED (cont'd)			ALRB Upheld	Mixed Result	Adverse Ruling
*mr	9.	San Diego Nursery v. ALRB (1971) (hg. den.) (4:93)	1		
*mr	10	10. John Elmore, Inc. v. ALRB (1979) (hg. den.) (4:98)	1		
*m	11.	Garin Company v. ALRB (1979) (hg. den.) (5:5).....	1		
*mr	12.	Bertuccio Farms v. ALRB (1979) (hg. den.) (5:5).....	1		
*mr	13.	Mario Saikhon, Inc. v. ALRB (1979) (5:44)...	1		
*m	14.	Belridge Farms v. ALRB (1979) (hg. den.) (4:30)	1		
*mr	15.	Jesus Martinez v. ALRB (1980) (5:51)...	1		
*m	16.	Security Farms v. ALRB (1980) (4:67)...	1		

(c) PETITIONS FOR REVIEW DECIDED (cont'd)			ALRB Upheld	Mixed Result	Adverse Ruling
mr (po)	17.	Royal Packing Co. V. ALRB (1980) 101 Cal. App. 3d 826 (5:31).....	1		
m	18.	Oceanview Farms v. ALRB (1980) (hg. den.) (5:71)	1		
*m	19.	Superior Farming Co. v. ALRB (1980) (hg. (5:6).....	1		
*mr	20.	D'Arrigo Bros. v. ALRB (1980) (hg. den.) (4:45)	1		
*m	21.	Kaplan's Fruit & Produce v. ALRB (1980) (hg. den.) (5:40)	1		
*m	22.	Tenneco West, Inc. v. ALRB (1980) (hg. den.) (3:92)	1		
*m	23.	Tenneco West v. ALRB (1980) (hg. den.) (4:16)	1		
m (po)	24.	Abatti Farms, Inc. v. ALRB (1980) 107 Cal.		1	

(c) PETITIONS FOR REVIEW (cont'd)			ALRB	Mixed	Adverse
			Upheld	Result	Ruling
		App. 3d 937 (hg. den.) (5:34)			
*m	25.	Tex-Cal Land Mgmt., Inc. (1980) (5:29)....	1		
*mr	26.	Pappas & Co. (1980) (hg. den.) (5:52)....	1		
*mr	27.	High & Mighty Farms (1980) (hg. den.) (6:34)	1		
mr (po)	28.	George Arakelian Farms, Inc. (1980) 111 Cal. App. 3d 258 (5:10)		1	
*mr	29.	O.P. Murphy Produce (1980) (hg. den.) (5:63)	1		
*mr	30.	High & Mighty Farms (1980) (6:34).....	1		
*mr	31.	California Coastal Farms (1980) (hg. den.) (6:25)	1		
*m (po)	32.	Merrill Farms (1980) 113 Cal. App. 3d 176 (hg. den.) (5:58)			1
*mr	33.	J.R. Norton (1981) (hg. den.) (6:26).....	1		

		(c) PETITIONS FOR REVIEW DECIDED (cont'd)	ALRB Upheld	Mixed Result	Adverse Ruling
m	34.	Sam Andrews' Sons (1981) (6:44)	1		
m	35.	Miranda Mushroom, Inc. (1981) (hg. den.) (6:22)	1		
*mr	36.	Associated Produce (1981) (6:54)	1		
*mr	37.	UFW v. ALRB Kaplan's Fruit & Produce (1981) (6:36)	1		
mr (o)	38.	Eto v. ALRB (1981) (6:20) (hg. den.)	1		
*m	39.	Ron Nunn v. ALRB (1981) (6:41)	1		
*m	40.	Tenneco West v. ALRB (1981) (6:53)....	1		
*mr	41.	Holtville Farms v. ALRB (1981) (7:15) (hg. den.)	1		
m	42.	Ranch No. 1 v. ALRB (1982) (6:37) (hg. den.)	1		
*mr	43.	Verde Produce v. ALRB (1982) (7:27) (hg. den.)	1		

			(c) PETITIONS FOR REVIEW DECIDED (cont'd)	ALRB Upheld	Mixed Result	Adverse Ruling
	*m	44.	Guimarra Vineyards v. ALRB (1982) (7:7) ...	1		
	*mr	45.	Bertuccio v. ALRB (1982) (81-CL-20-SAL)...	1		
g	m(po)	46.	Tex-Cal v. ALRB (1982) 135 Cal. App. 3d 906 (7:11)			1
	*mr	47.	Arakelian Farms v. ALRB (1982) (8:32)....	1		
	*m	48.	Merrill Farms v. ALRB (1982) (8:4)	1		
	*mr	49.	Martori Farms v. ALRB (1982) (8:23) (hg. den.)	1		
	*mr	50.	Royal Packing v. ALRB (1982) (8:17)....	1		
	*mr	51.	Bertuccio Farms v. ALRB (1982) (8:6) (hg. den.)	1		

			ALRB	Mixed	Adverse
(c) PETITIONS FOR REVIEW DECIDED (cont'd)			Upheld	Result	Ruling
*mr	52.	San Clemente Ranch v. ALRB (1982) (8:29) ...	1		
*mr	53.	Bertuccio Farms v. ALRB (1982) (8:39) (hg. den.)	1		
mr (po)	54.	Mario Saikhon v. ALRB (1983) 140 Cal. App. 3d 581 (8:88) (hg. den.)	1		
*m	55.	Abatti Farms v. ALRB (1983) (7:36) (hg. den.)	1		
*mr	56.	Kophammer Farms v. ALRB (1983) (8:21) ...	1		
mr (po)	57.	Nish Noroian Farms v. ALRB (1983) - Cal. App. 3d - (8:25)		1	

APPENDIX B

CALIFORNIA FRUIT, NUT AND VEGETABLE PRODUCTION: MARKET SHARE OF NATIONAL PRODUCTION[1]

Almonds	99.9%
Apricots	97.4%
Avocados	85.7%
Broccoli	89.9%
Carrots	49.0%
Cauliflower	71.3%
Celery	71.4%
Dates	99.8%
Figs	99.9%
Garlic	100%
Grapes	92.6%
Lettuce	72.3%
Melons (Honeydew)	65.8%
Nectarines[2]	97.2%
Olives[2]	99.9%
Onions	31.1%
Peaches	66.2%
Pears	39.8%

1. Derived from California Department of Food and Agriculture, Crop and Livestock Reporting Service, 1982 Annual.
2. Derived from 1978 Census of Agriculture (United States Department of Agriculture, Bureau of the Census, June, 1981).

Pistachios	100%
Plums[2]	88.4%
Prunes	100%
Potatoes	100%
Winter	58.9%
Late Spring	46.5%
Early Summer	14.3%
Plums	88.4%
Strawberries	71.4%
Tomatoes (including those for processing)	75.4%
Walnuts	99.0%

In the Supreme Court of the United States

October Term, 1981

RUBIN KREMER,

Petitioner,

vs.

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

23

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION FIRST DEPARTMENT

RUBIN KREMER, Petitioner-Appellant,

v.

The State Division on Human Rights,
The State Human Rights Appeal Board
and Chemical Construction Corporation, Respondents

NOTICE OF PETITION

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Rubin Kremer, verified the 6 day of December, 1977, an application will be made at a term of this court to be held at the courthouse thereof, located at Madison Avenue and 25th Street, Borough of Manhattan, City of New York, on the 28 of December, 1977, at 10:00 a.m., or as soon thereafter as counsel can be heard, for a judgment pursuant to § 298 of the Human Rights Law and pursuant to CPLR Article 78, setting aside the determination and order made by respondents dismissing petitioner's complaint of an unlawful discriminatory practice and denying his reinstatement as a piping analytical engineer with Chemical Construction Corporation, and compelling said respondents to reinstate petitioner as such engineer, and awarding his back pay, and for such other and further

relief as may be deemed just and proper.

Dated: December 5, 1977
New York, N.Y.

Yours, et cetera,
RUBIN KREMER
c/o R. Garkawe
2120 Wallace Ave.
Apt. 2B
Bronx, New York
10462
Tel.: 892-1322

To:
Chemical Construction Corporation
Mr. Don Steenland,
Personnel Director
One Penn Plaza
New York, N.Y. 10001

State Human Rights Appeal Board
Two World Center, 82nd Floor
New York, N.Y. 10047

Donald M. Crook, Esq.
Layton & Sherman, Esqs.
50 Rockefeller Plaza
New York, N.Y. 10020

12 Encl. No. 12

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 27, 1978

Present-Hon. Francis T. Murphy, Jr., Presiding Justice
Samuel J. Silverman
Herbert B. Evans
Arnold L. Fein
Arthur Markewich Justices

1877

[M4560]

RUBIN KREMER,

--against--

THE STATE DIVISION ON HUMAN RIGHTS, THE STATE HUMAN RIGHTS APPEAL BOARD and CHEMICAL CONSTRUCTION CORPORATION, Respondents

The above-named petitioner having presented a petition to this Court praying for an order, pursuant to Section 298 of the Executive Law, setting aside and annulling the determination of respondent The State Human Rights Appeal Board dated November 25, 1977, dismissing peti-

tioner's complaint and determining there was no probable cause to believe that respondent Chemical Construction Corporation engaged in the unlawful discriminatory practice complained of, and respondent Chemical Construction, Corporation having submitted a memorandum in answer to said petition,

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Now, upon reading and filing the notice of application, with proof of due service thereof, the petition of Rubin Kremer, verified December 6, 1977, and the memorandum of Rubin Kremer, all read in support of the application, and the memorandum of Messrs. Layton and Sherman in opposition to said application, and after hearing Mr. Rubin Kremer, appearing **pro se**, for the application, and Messrs. Layton and Sherman opposed; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent, The State Human Rights Appeal Board, be and the same hereby is confirmed, without costs and without disbursements.

Enter:

Joseph J. Lucchi
Clerk

PROOF OF SERVICE

STATE OF CALIFORNIA)

) ss:

COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509.

On October 14, 1983, I served the within MOTION OF WESTERN GROWERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF GRANTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA and BRIEF OF AMICUS CURIAE, WESTERN GROWERS ASSOCIATION IN SUPPORT OF GRANTING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA on the interested parties in said action, by placing a true copy in each of sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

DANIEL G. STONE, Chief Deputy Solicitor
AGRICULTURAL LABOR RELATIONS BOARD
915 Capitol Mall, Third Floor
Sacramento, CA 95814

GRAY, CARY, AMES & FRYE
2100 Union Bank Building
San Diego, California 92101

HEWITT, SULLIVAN & MARSHALL
1010 Second Avenue, Suite 2121
San Diego, California 92101

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED ON October 14, 1983, at Riverside, California.

JACK GALLAGHER